IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

No. 386

FEDERAL POWER COMMISSION,
Petitioner,

v.

TEXACO INC. AND PAN AMERICAN PETROLEUM CORPORATION,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR RESPONDENT TEXACO INC.

ALFRED C. DECRANE, JR.
JAMES J. FLOOD, JR.
WILLIAM K. TELL, JR.
P. O. Box 52332
Houston, Texas 77052

P. R. WIMBISH
P. O. Box 2420
Tulsa 2, Oklahoma

Attorneys for Respondent Texaco Inc.

Of Counsel:

PAUL F. SCHLICHER
135 East 42nd Street
New York 17, New York

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OPINION BELOW

The opinion of the Court of Appeals (R. 104-121) is reported at 317 F. 2d 796.

JURISDICTION

The judgment of the Court of Appeals setting aside the Commission's orders and remanding the proceedings was entered on May 20, 1963 (R. 122). The petition for writ of certiorari was filed on August 19, 1963, and granted on November 12, 1963 (R. 123). The jurisdiction of this Court was invoked under 28 U.S.C. 1254 (1) and Section 19(b) of the Natural Gas Act, 15 U.S.C. 717r(b).

QUESTIONS PRESENTED

1. Whether Federal Power Commission findings and orders going to "the present or future public convenience and necessity", the "unjust, unreasonable, unduly discriminatory or preferential" nature of any "practice or contract", or the prescription of rates or contracts for the future must be made and issued on the basis of an evidentiary record developed upon agency hearing in order to be consistent with constitutional requirements of due process and the provisions of the Natural Gas Act and the Administrative Procedure Act?

2. Whether, on the basis of the facts of record, Texaco was "located" in the Tenth Circuit, consistent with the provisions of Section 19(b) of the Natural Gas Act?

STATUTES AND REGULATIONS INVOLVED

Pertinent provisions of the Natural Gas Act, 52 Stat. 821, as amended, 15 U.S.C. 717-717w, and of the Commission's Regulations, as amended, 18 C.F.R. (Cum. Supp. 1963), are set out in the Appendix to Petitioner's Brief, pp. 52-62.[1] Petitioner has also printed Section 4 of the Administrative Procedure Act, 60 Stat. 237, 5 U.S.C. 1003 because it is considered to be "pertinent" (Pet. Br., pp. 51-52). We consider Sections 2, 5, 7 and 8 of that Act, 5 U.S.C. 1001, 1003, 1005, 1006 to be of equal pertinence, and these sections are set out in Appendix C hereto, *infra*, pp. 79-84. The Commission orders in issue, together with the amendatory language these orders introduced to the regulations, appear in the record as follows: Order No. 232, amending

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[1] Hereinafter referred to as "Pet. Br." Attention is also called to the fact that emphasis in quotations herein has been supplied unless otherwise noted.

18 C.F.R. 154.91(a) and 154.93, at R. 12-17; Order No. 232A, amending 18 C.F.R. 154.93, at R. 18-21; Order No. 242, amending 18 C.F.R. 154.93, 157.14, and 157.25, at R. 22-25.

STATEMENT

The portion of the case below now before this Court arose under the Petition of Texaco Inc. (hereinafter referred to as "Texaco") seeking review of orders of the petitioner Federal Power Commission (hereinafter referred to as "Petitioner" or "Commission") summarily rejecting an application for a certificate of public convenience and necessity together with the rate schedule (contract, 18 C.F.R. 154.93) underlying that application which had been submitted for filing. Petitioner conceded, and the Court of Appeals below recognized (R. 119), that Texaco's petition seeking review of the Commission's rejection of the certificate application and contract, without hearing or factual record, encompassed a review by the Tenth Circuit of the lawfulness of those certain underlying general orders of Petitioner which purported to authorize the summary rejection: Order No. 242, 27 Fed. Reg. 1356, 27 FPC 339 (R. 22-25); amending Order No. 232A, 26 Fed. Reg. 2850, 25 FPC 609 (R. 18-21); which had amended Order No. 232, 26 Fed. Reg. 1983, 25 FPC 379 (R. 12-17).

The background situation — While Petitioner's "Statement" includes consideration of certain historical aspects of the regulatory process (Pet. Br. pp. 3-10) additional background, significant to disposition of these matters, has been provided in the Brief filed herein by Pan American Petroleum Corp. (Pan American), also a petitioner below and now a Respondent here. The Court is respectfully directed to that portion of the Pan American "Statement", pp. 4 to 9, for information not repeated here, but complementary to this discussion.

The Texaco sale — Texaco's particular problem with the so-called "forbidden" contract price provicions began on May 1, 1962 when it agreed to sell and Natural Gas Pipeline Company of America, a pipeline company engaged in the interstate transmission of natural gas, agreed to purchase certain quantities of natural gas to be produced by Texaco from properties in which it owned a producing interest and which were located in the Camrick Southeast Field, Beaver County, Oklahoma, (R. 32-62). The contract between Texaco and its purchaser covers the disposition of the natural gas production for a period of twenty years "commencing on the first day of the month following the first delivery of gas" under the contract (R. 56).[2]

During the negotiation sessions which led to the May 1, 1962 gas sales-purchase agreement, the parties hammered out a contract of some breadth, designed to delineate and enumerate to the extent possible the duties and rights of the respective parties over the protracted sales period and under the variety of circumstances and conditions which could arise, or be expected during such an extended production period. (e.g. R. 34, 35, 36, 42, 43, 45, 49, 50, 53, 55). Specifically, and because of the length of the sales period, the negotiators gave particular attention to the construction and flexibility of the contract pricing provisions since the prices provided or derived thereunder would bind, and

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[2] As a result of the rejection of its certificate application by the Commission and the alleged determination that this contract contained objectionable pricing provisions (R. 63-64), Texaco has not yet, almost two years after execution of its agreement to sell, been able to commence deliveries under this contract. This kind of intense economic hardship imposed upon a producer which seeks court review of regulatory orders of doubtful legality is the result of the holding below which precluded direct review of the underlying regulations (R. 112-114). See *Pan American Petroleum Corp.* v. *Federal Power Commission*, No. 387, this Term, petition for writ of certiorari pending.

limit,[3] the parties through the long years and changing circumstances of the sales commitment (R. 50-52, 53-54).

Thus, in addition to the specifically designated initial delivery price of "seventeen (17) cents" per thousand cubic feet (R. 51), the contract between Texaco and its purchaser-pipeline also provided price changing provisions which would become effective at definite times or upon the happening of definite circumstances in the future, such as the passage of five, ten, or fifteen years after the commencement of initial deliveries (R. 51), or in the event of increased taxation on the "production, severance, gathering, transportation, sale or delivery of gas" disposed of under the contract (R. 53). However, Article X of the sales agreement — the basic price provision — provided yet another means of compensation for and cognizance of the multitude of interrelated uncertainties of the market place and the production process during the twenty-year sales commitment period. Thus, renegotiation is to be undertaken six months prior to the beginning of the third (1974) and fourth (1979) of the four five-year periods into which the contract term has been divided.[4] The price, if renegotiated, will have relation to prices then being paid by interstate pipeline purchasers other than Texaco's purchaser here, but for purchases of natural gas they are then making in the generally contiguous production area (Beaver and Texas Coun-

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[3] *United Gas Pipe Line Co.* v. *Mobile Gas Service Corp.*, 350 U.S. 332; *Sunray Mid-Continent Oil Co.* v. *Federal Power Commission*, 364 U.S. 137.

[4] As noted in footnote 2, *supra*, the time periods in the contract are related to the date of initial sales, still delayed by the action being reviewed here. As a result, the period for which renegotiations are contemplated may be more than ten or fifteen years in the future, and the periods to which these renegotiated prices will apply, more than fourteen or nineteen years distant.

ties, Oklahoma) (R. 51). To insure equitability in renegotiation, it is specifically required that appropriate adjustments are to be made to any prices used for comparison purposes in order to insure comparability and recognition of the "facts existing" as to the instant sale at the time the negotiations commence (R. 51-52).

Petitioner's actions — Under cover of August 27, 1962, and as required by Section 4(c) of the Natural Gas Act, and Petitioner's procedural regulations, Texaco filed the May 1, 1962 contract with the Commission as its rate schedule for sales from the specified Camrick Southeast acreage (R. 30-31). Pursuant to Section 7 of the Act, and other applicable regulations, Texaco also filed its application for a certificate of public convenience and necessity (R. 26-29). Included in this application was Texaco's sworn plea for immediate, temporary relief pursuant to the Commission's Regulation on Temporary Authorizations, 18 C.F.R. 157.28, and Texaco's notice that sales by other producers on offsetting properties were causing migration of gas and drainage from Texaco's leases (R. 28).[5]

Texaco was not afforded the relief of temporary authorization for the sale, which would have permitted it to stop gas migration by the initiation of its own production; instead, by order of October 5, 1962 (R. 63-64), Petitioner summarily rejected both Texaco's rate schedule filing and its certificate application. Petitioner "rejected" the submittals because "review of the contract discloses that it

[5] Petitioner's public files show that there are some 31 other producers in the Camrick Southeast Field selling natural gas production in interstate commerce for resale under some 72 contracts, accepted for filing by the Commission as rate schedules, which contain renegotation clauses similar to the "objectionable" clause contained in Texaco's May 1, 1962, summarily-rejected contract.

contains pricing provisions other than the permissible provisions set forth in Section 154.93 of the Commission's Regulations." (R. 62).

The provisions of Section 154.93 referred to in the rejection order are the product of Petitioner's Order Nos. 232 and 232A. It was Order No. 232, issued March 3, 1961, which declared several types of common natural-gas-contract price clauses to be "inoperative and of no effect at law" in contracts tendered for filing with the Commission after April 2, 1961 (R. 12-17). On March 31, 1961, the Commission amended this Order by issuance of Order No. 232A, which did little in actuality to modify the harsh action of the earlier order.[6] (R. 18-21). Then, on February 8, 1962, Petitioner issued Order No. 242. This directive provided for the outright rejection of contracts, together with their related certificate applications, if "price changing provisions other than the permissible provisions" are included (R. 22-25).

The rejection order of October 5, 1962 was bottomed on the purported authority of these regulations.

Following the procedures provided by Section 19(a) of the Natural Gas Act, Texaco duly filed an application for rehearing of the October 5 rejection (R. 65-69). By order of November 30, 1962, the Commission denied both relief and rehearing (R. 70-71).

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[6] The so-called price-redetermination permitted as a result of the modification deprives the producer of the increased rates until after Commission decision on the rates as filed by some other producer; thus depriving him of an access to the Commission, through Section 4(e),-at a time when his economic needs may well call for an increase, and this in turn will preclude collection of the rate until after passage of the period, the facts and conditions of which, will prove the need for the increase.

A petition for review was filed with the Court of Appeals for the Tenth Circuit within sixty days after the order of November 30, 1962, as required by Section 19(b) of the Act (R. 1-11).

The decision of the Court of Appeals — The May 20, 1963 Opinion of the court below (R. 104-121) actually ruled upon seven pending cases which had been argued together; only two of those matters are now before this Court in the instant proceeding:

1. Prior to the issuance of Order No. 242, the Commission had implemented its Order Nos. 232 and 232A by accepting all rate schedules for filing with the conditional notation that if "objectionable clauses" were included in the agreements, they were "inoperative and of no effect at law" (R. 107). Cases 6947, 6973 and 7135 attacked these efforts, but the decision below accepted the Commission's argument that there was no present aggrievement in these instances (R. 114-116).

2. When Order No. 242 subsequently issued, Case Nos. 7002 and 7179 were filed to obtain review of the rule-making proceeding itself. Here again, the Commission urged dismissal on the ground "that the Act vests no jurisdiction in the court of appeals to review orders of the Commission amending its general rules and regulations" (R. 112). Although it recognized that such review "would aid in the administration of the Act" (R. 113), the Court did dismiss the actions, but on its stated grounds that the orders complained of do not themselves presently adversely affect the parties (R. 115).

3. Case Nos. 7217 and 7303 relate to those portions of the combined matters heard below which were decided by the lower court to be present reviewable matters aggrieving the parties. It is these causes which sought review of

Petitioner's implementation of Order No. 242 by the rejection out of hand of the Texaco and Pan American rate schedules and certificate applications.

The Commission did seek dismissal of No. 7217 below on the grounds that venue was not properly in the Tenth Circuit since, in Petitioner's view, Texaco was not "located" within that Circuit under Petitioner's interpretation of Section 19(b) of the Natural Gas Act. The Court held that "the question of whether Texaco is located in the Tenth Circuit must be determined on the particular facts" and found that on the basis of the undenied allegations "Texaco is located in [this] circuit for the purpose of the venue provisions of § 19(b)" (R. 113).

As noted above, Petitioner sought to dismiss, on one ground or another, six of the seven cases before the reviewing circuit court. While such dismissal was permitted as to some of the actions because of lack of present aggrievement, the Court did note that general Order Nos. 232 and 232A:

> ". . . do not, and cannot, invalidate either retroactively or prospectively price-changing clauses in a gas-sales contract between a producer and a pipeline and are no justification for the rejection, without hearing, of a rate or charge based on such clauses." (R. 121).

But the Court of Appeals was careful to limit this effort of the Commission to avoid review of Commission rulings. Aware that the Commission has successfully resisted efforts to achieve judicial review of the "record" or the "evidence" upon which the Commission purported to base the findings of its general orders, the Court of Appeals sought record support for the rejection of Texaco's filings. However, all the record contained were copies of the never-reviewed general orders with their never-reviewed conclusions. Thus, the Tenth Circuit held:

". . . The summary rejection of the Texaco and Pan American contracts without a hearing deprives the court of any record upon which the rejection may be sustained, other than the general orders which are attacked. As we have noted above, the Commission has successfully maintained that these general orders are not subject to direct court review. This bootstrap operation of the Commission, in practical effect, circumvents court review of the basic question — the propriety of indefinite price-changing clauses.

"Neither sympathy for the administrative difficulties of the Commission nor recognition of its expertise in the regulation of those subject to the Natural Gas Act justifies disregard of the statutes under which the Commission operates. We find no statutory authorization for the Commission actions here attacked." (R. 117).

The court then held that the authority to issue rules and regulations is "not a source of power to regulate in conflict with substantive provisions of the Act," (R. 117), and asserted that the provisions of the contract of any regulated entity could not be modified nor a certificate denied unless proper findings, supported by an evidentiary record, subject to court review, supported that action.

". . . In the cases at bar the Commission has held no adversary hearings at which facts have been adduced to sustain findings which, on the basis of statutory standards, support the decisions reached. No amount of administrative expertise can supply these deficiencies." (R. 119)

SUMMARY OF ARGUMENT

The Petitioner has assumed the very issue in question. Petitioner did not properly follow the rulemaking procedures of the Administrative Procedure Act, Section 4(b), when, without proper hearing, record, findings, or possi-

bility of court review it "forbid" use of certain contract forms and prescribed the rate language and contracts which must be utilized by independent producers in their interstate sales. The Natural Gas Act, the statute from which the Commission derives its delineated powers, specifically requires that the proscription of any rate, contract, or practice, and the prescription of other rates; contracts or charges may be made only after a full hearing; therefore, the Administrative Procedure Act specifically forbids the course of action followed by the Commission. The legislative history and contemporaneous actions of those associated with passage of the pertinent acts confirm the clear relationship between these statutes, and the need for formal action before the Commission may act as it did here.

Sections 4, 5 and 7 of the Natural Gas Act demand a full hearing before issuance of any order purporting to determine either "present or future public convenience and necessity" or "just and reasonable" rates or contracts. No Commission action under Section 16, a general housekeeping and ordering authority, is appropriate to the Natural Gas Act if it frustrates and circumvents the Congressional requirement of a hearing coupled with the possibility of full judicial review as provided by other specific directives of that Act. Expertise and discretion cannot be substituted for the findings and analysis necessarily antecedent to valid agency substantive actions. *Burlington Truck Lines* v. *United States*, 371 U.S. 156.

The Commission's orders which outlawed the future use of previously acceptable flexible contract price clauses purported to make findings establishing the reasonableness of that action, but no record was ever available from which the reviewing court could do more than accept the self-styled "reasonableness" of that agency action. However,

public knowledge and the Commission's own past practices themselves refute its alleged "findings." It has been held to be the Congressional purpose that natural gas companies regulated by the Commission not be precluded by law from flexibility in the pricing of the commodity they sell, *United Gas Pipe Line Co.* v. *Memphis Light, Gas and Water Division*, 358 U.S. 113. There can be no presumption that the Commission's attempt to frustrate this Congressional intent is "reasonable," particularly when the Commission is yet only on the threshold of what it hopes will be a workable method for ascertaining just and reasonable rates for producers. *Wisconsin* v. *Federal Power Commission*, 373 U.S. 294. The denial to independent producers of contractual access to the Commission, so that an opportunity is available for the producer to justify his prices, is an abuse of statutory power. *United Gas Pipe Line Co.* v. *Mobile Gas Service Corp.*, 350 U.S. 332.

Section 19(b) of the Natural Gas Act, *inter alia*, permits venue for judicial review purpose in "any circuit" where the affected natural-gas company "is located." This provision, enacted for the convenience of petitioners, and not the agency, *Panhandle Eastern Pipe Line Co.* v. *Federal Power Commission*, 324 U.S. 635, is a specific Congressional change from earlier drafted language providing more limited venue privileges, and as such, displays a clear intent to avoid confinement to the more narrow, and rejected term "resides." Since venue is not limited to "a" or to "the" circuit, determination of location in "any" one circuit as opposed to "any" other becomes a question of fact in the particular instance. *Colorado Interstate Gas Co.* v. *Federal Power Commission*, 142 F. 2d 943, affirmed, 324 U.S. 581. The undisputed facts support the finding that venue lay with the Tenth Circuit.

ARGUMENT

The decision of the Court below does not relegate the Federal Power Commission to "case-by-case" regulation of independent producers; and in issuing its Order Nos. 232, 232A and 242 — the orders eminating from the purported "rulemaking" — Petitioner did *not* comply with the provisions of the Administrative Procedure Act.[7] These points are vital because erroneous assumptions as to each permeate the entire argument advanced by Petitioner.

That portion of Petitioner's Brief (pp. 19-39) which discusses the decision below and asserts its inconsistency with Petitioner's statutory grant of powers under the Gas Act and its non-compatability with other decisions of this Court suffers from the fatal deficiency of assuming, without establishing, these premises. As will be shown, false foundations have necessarily led Petitioner to false conclusions.

I.

THE COMMISSION DID NOT FOLLOW THE RULEMAKING REQUIREMENTS OF THE ADMINISTRATIVE PROCEDURE ACT.

Petitioner asserts here and uses as a premise for later argument, the claim that in issuing the questioned orders it followed the requirements of the Administrative Procedure Act — to which it is admittedly subject. (Pet. Br. p. 27, p. 29, note 31). See also, *State Corporation Commission of Kansas* v. *Federal Power Commission*, 206 F. 2d 690, 723, cert. denied, 346 U.S. 922. Such is decidedly and demonstrably not the case.

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[7] Sections 4, 5 and 7 of the Natural Gas Act, 15 U.S.C. 717c, 717d, and 717f, and Sections 4, 5, 7 and 8 of the Administrative Procedure Act, 5 U.S.C. 1003, 1004, 1006 and 1007 must be referred to herein with regularity. To aid in clarity, yet reduce verbiage, the former statute is sometimes herein referred to as "Gas Act" and the latter as "APA."

Section 4(b) of the Administrative Procedure Act does prescribe formal and informal procedures for "rulemaking" as defined in that Act. Section 2 of the APA sets forth the following definition:

> "(c) Rule and Rulemaking — 'Rule' means the whole or any part of any agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy . . . and includes the *approval* or *prescription for the future* of rates . . . prices . . . services or allowances therefor . . . or practices bearing upon any of the foregoing. 'Rulemaking' means agency process for the formulation, amendment, or repeal of a rule."

Two other definitions set out in Section 2 of the APA are pertinent and bear upon the failure of the Petitioner to follow the proper statutory course in the promulgation of the orders negated or modified below:

> "(d) Order or adjudication — 'Order' means . . . final disposition . . . in any matter other than rule making but including licensing. 'Adjudication' means agency process for the formulation of an order.
>
> "(e) License and licensing — 'License' includes . . . any agency permit, certificate, approval . . . or other form of permission. 'Licensing' includes agency process respecting the grant, renewal, denial, revocation, suspension, annulment, withdrawal, limitation amendment, modification, or conditioning of a license."

These matters are quoted in some detail because of their key role in refutation of the Commission's erroneous assumption that it has followed the rulemaking provisions of the APA in issuing the complained of orders.

Section 4(b) of the Administrative Procedure Act specifically provides that "[w]here rules are required by statute to be made on the record after opportunity for an agency hearing" the otherwise acceptable procedures of limiting

agency consideration to written views or arguments must give way to the strict hearing and decision processes established in other sections of the APA — steps which this record shows were definitely not followed in the instant proceeding (R. 12-25; 118). Initially, then, it must be decided whether some statute requires that "rules" going to the subject matter of the rules promulgated in Order Nos. 232, 232A and 242 be made on the record and after hearing. Quite clearly, the Natural Gas Act does so require.

A. Section 5 of the Natural Gas Act restricts the determination of rates or contracts to be thereafter observed to cases where unreasonableness is found "after a hearing."

As quoted above, the APA includes within its definition of a "rule" any agency statement going to future rate or price practices. "Rule making" is the process of promulgating such a directive. It must be conceded that what the Commission did by its Order Nos. 232, 232A and 242 was issue a "statement of general . . . applicability and future effect" which went to the "practices bearing upon" producer rates and prices for natural gas sales. (R. 12-25). The Commission directed the elimination of certain practices (the use of so-called indefinite pricing clauses) and prescribed specifically what rate and price practice must be for the future. (R. 20-21).

The definition of "rule" and "rulemaking" appearing in the APA received direct Congressional attention.[8] Senate Documents, Volume 8, No. 248, "Administrative Procedure Act — Legislative History," 79th Cong., 2d Sess., 1946, pp. 14, 115, 191, 193, 197, 225.[8] Of particular signi-

[8] All of the Committee Reports and floor discussion leading to passage of the Administrative Procedure Act have been compiled and printed in this single document hereinafter referred to as "Legislative History."

ficance is the statement of the Attorney General set forth in his October 19, 1945 letter, commenting on the final draft of S. 7, which became the APA. The letter, addressed to the Honorable Pat McCarran, Chairman of the Senate Judiciary Committee, was ordered printed as part of the legislative history:

> "In Section 2(c) the phrase 'the approval or prescription for the future of rates, . . . prices, . . .' etc. is not, of course, intended to be exhaustive. . . . Specification of these particular subjects is deemed desirable, however, because there is no unanimity of recognition that they are, in fact, rulemaking . . ."
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> Legislative History, p. 225.

But Section 4(b) of the APA does not permit *all* rules to be issued after the mere "submission of written data, views, or arguments" as provided in the first sentence of that subsection. The next sentence demands that formal hearings be held if some other statute requires that the particular subject matter of the rule be issued only after hearing. Since Section 5(a) of the Gas Act does so require, Petitioner did not comply with Section 4(b) of the APA because it failed to undertake such a hearing. It is that elemental.

There can be no doubt that it is Section 5(a) of the Gas Act which delineates Petitioner's authority as to rates and contracts with future effectiveness. That Section says, *inter alia*:

> "Whenever the Commission, after a hearing . . . shall find that any rate . . . charged . . . or that any . . . practice, or contract affecting such rate . . . is unjust, unreasonable, unduly discriminatory, or preferential, the Commission shall determine the just and reasonable rate . . . practice, or contract to be thereafter observed and in force . . ."

This Court and other courts have uniformly interpreted the "hearing" required by this Section to demand far more than the "submission of written data." *Federal Power Commission* v. *Natural Gas Pipeline Company*, 315 U.S. 575; *Federal Power Commission* v. *Hope Natural Gas Company*, 320 U.S. 591; *Federal Power Commission* v. *Sierra Pacific Power Co.* 350 U.S. 348. As interpreted, these hearings comport with the later-enacted hearing requirements of Sections 7 and 8 of the APA. See, e.g., *Federal Power Commission* v. *Natural Gas Pipeline Co.*, 315 U.S. at 583-584. The Court below refused to permit the Commission to substitute some lesser procedure for this Congressionally-required hearing. (R. 117, 120). Since Section 5 of the Gas Act required a hearing, Section 4(b) of the APA required the same type of hearing.

Should any doubt remain that the Commission did not properly follow the requirements of Section 4(b) of the APA when it promulgated rates and contracts to be observed after April 2, 1962 (R. 25) without benefit of evidentiary hearing, record, or findings based upon that evidence it must be dispelled by the contemporaneous statements of those who were participants in the formation and passage of that Section of the APA.

As noted, the Attorney General and his office played an important role in reporting on administrative activity prior to passage of the Administrative Procedure Act in 1946 and in commenting and consulting with Congressional leaders on the draft of S. 7, 79th Cong., 1st Sess., which became this Act. Shortly after passage of the Act, the Department of Justice published the "Attorney General's Manual on the Administrative Procedure Act." The manual was designed to be "a general analysis of the provisions of the Act" and it was "intended primarily as a guide to the agencies in adjusting their procedures to the require-

ments of the Act", page 6. Thus, each Section and Subsection of the newly-enacted APA was discussed seriatim. Under the discussion of Section 4(b) of the APA, and particularly the exceptions where "formal rule making" would be required, it was the considered opinion of the Department of Justice that the Natural Gas Act was one of those few statutes which required hearings prior to the issuance of rules of general applicability:

> ". . . where rates or prices are established by an agency after a hearing required by statute, . . . the agency's action must be based upon the evidence adduced at the hearing. Sometimes the requirement of decision on the record is readily inferred from other statutory provisions defining judicial review. For example, rate orders issued by the Federal Power Commission pursuant to the Natural Gas Act (15 U.S.C. 717) may be made only after hearing; upon review in a circuit court of appeals or the Court of Appeals for the District of Columbia, the Commission certifies and files with the court 'a transcript of the record upon which the order complained of was entered,' and the Commission's findings of fact 'if supported by substantial evidence, shall be conclusive.' It seems clear that these provisions of the Natural Gas Act must be construed as requiring the Commission to determine rates 'on the record after opportunity for an agency hearing.' See H.R. Rep. p. 51, fn. 9 (Sen. Doc. p. 285)"
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> Attorney General's Manual, page 33.

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> "With respect to the types of rulemaking discussed above, the statutes [discussed, including the Natural Gas Act] not only specifically require the agencies to hold hearings but also, specifically, or by clear implication, or by established administrative and judicial construction, require such rules to be formulated upon the basis of the evidentiary record made in the hearing. In these situations, the public rule making procedures

required by Section 4(b) will consist of a hearing conducted in accordance with sections 7 and 8."

Attorney General's Manual, page 34.

Thus, it was clearly understood at the time of the passage of the APA, by those who had studied and worked with the various bills and had consulted and advised with the legislators who drafted and passed the bill, that the promulgation of rates or contracts or practices for the future, matters requiring a hearing under Section 5(a) of the Gas Act, were matters which came within the formal rulemaking reservation of Section 4(b) of the APA and which required the hearing, the evidence and the other protections of Sections 7 and 8 of the APA. As noted earlier, the Commission in its brief filed here and in the Orders complained of cited and relied upon its authority under Section 5(a) of the Gas Act. The decision below merely prohibits the Commission from circumventing the clear language of the two statutes in question and requires that a hearing be held and an evidentiary record formulated before agency promulgation of rates, contracts or practices "to be thereafter observed and enforced."

B. Section 4 of the Gas Act, itself requiring hearings, does not provide escape from the formal requirements of Section 4(b) of the APA.

On its face, Section 4(e) of the Natural Gas Act deals specifically and directly with increased rates and the testing of a "new schedule" for an existing sale or service. The power granted here also goes to the testing of past rates, because of the refund provisions of this Section. Ruling upon the lawfulness of rates charged in the past is, of course, adjudication under the Administrative Procedure Act, and not rulemaking. *Arizona Grocery Co.* v. *Atchison, Topeka & Santa Fe R. R. Co.*, 284 U.S. 373;

Legislative History, p. 225. Thus, any action by Petitioner, insofar as it affected past rates, would, as adjudication, be specifically subject to the provisions of Section 5 of the APA and, pursuant thereto, Sections 7 and 8. The Commission has never alleged that it has complied with these provisions, although it did refer to Section 4 of the Gas Act in Order Nos. 232, 232A and 242.

In its argument here, Petitioner interprets its Section 4 Gas Act powers as also permitting the prescription of future rates by the incorporation of its Section 5(a) Gas Act powers. (Pet. Br. p. 32). Even if accepted, this interpretation could not excuse the failure to comply with Section 4(b) of the APA.

This Court analyzed the Commission's rate review and rate setting powers, and the limitation on those powers, in its decisions in *United Gas Pipe Line Co.* v. *Mobile Gas Service Corp.*, 350 U.S. 332, and *United Gas Pipe Line Co.* v. *Memphis Light, Gas and Water Division*, 358 U.S. 103. In the *Mobile* decision, there was specific occasion to discuss both Sections 4 and 5 of the Act:

> "... These sections [Sections 4(d) and (e) and 5(a)] are simply parts of a single statutory scheme under which all rates are established initially by the natural gas companies, by contract or otherwise, and all rates are subject to being modified by the Commission upon a finding that they are unlawful. The Act merely defines the review powers of the Commission and imposes such duties on natural gas companies as are necessary to effectuate those powers; it purports neither to grant nor define the initial rate-setting powers of natural gas companes." 350 U.S. at 341.

Most assuredly, with Sections 4 and 5 being parts of a "single statutory scheme" the Commission cannot in some way negate the specific hearing requirements of Section

5(a) of the Gas Act by exercising the powers in that Section indirectly through some other Section of that Act. Further, Section 4 itself requires that Petitioner "enter upon a hearing", and not until "after full hearing" may it take action as to the rate, charge, classification or service reviewed.[9] Certainly no authority can be conjured from these express hearing requirements which permits avoidance of the hearing requirements of the last sentence of Section 4(b) of the APA. Even if some sort of "rule-making authority" as opposed to "adjudication" powers flows from Section 4(e) of the Gas Act, the specific "hearing" requirements of this statute cannot be ignored when applying the provisions of the APA.

C. Section 7 of the Natural Gas Act similarly requires hearing before action and does not provide authority for the use of abbreviated rulemaking procedures which fix rates or contracts.

Just as it has been shown above that Petitioner cited Sections 4 and 5 of the Gas Act in support of its actions in issuing the orders complained of here, so did Petitioner reply upon Section 7 of that Act. This Section of the Natural Gas Act deals with the certification or licensing powers of the Commission, insofar as its authority over natural gas matters is concerned.

We have set forth the definitions of adjudication and licensing as they are specifically spelled out in Section 2 of the Administrative Procedure Act, *supra*, page 14. As

[9] Although Section 5(a) of the Gas Act does give some authority to review a "practice, or contract" affecting a rate, no mention of "contracts" appears in Section 4(e) of the Gas Act. Further, in each of the cases cited to support its interpretation of its powers for the future under Section 4 of the Gas Act, (Pet. Br. p. 38, note 34) full hearings were permitted. *Mississippi River Fuel Corp. v. Federal Power Commission*, 252 F. 2d 619 at 621, see 14 FPC 353; *Michigan Consolidated Gas Co. v. Panhandle Eastern Pipe Line Co.*, 236 F. 2d 60 at 62, see 3 FPC 273.

therein defined, adjudication is the process of formulating an order in anything other than a rulemaking matter. Thus, by definition, the issuance of a license or certificate or the "modification or conditioning," of a certificate is an adjudicatory matter. As such, the Administrative Procedure Act, Section 5, specifically requires that strict adjudication procedures be utilized, including the requirements of Sections 7 and 8 of the APA. There is no basis whatsoever for the use of "rulemaking" procedures — formal or informal. Therefore, the discussion of the Commission's prior actions in certificate matters arising under Section 7 of the Gas Act (Pet. Br. pp. 33-38) is no authority for the action taken by the Commission in the issuance of its Order Nos. 232, 232A and 242. In fact, since, in every instance, the actions taken as to the certificate matters cited were not undertaken until after full hearing, these past actions of Petitioner themselves condemn the course followed in Order Nos. 232, 232A and 242.[10]

By definition, Section 7 of the Gas Act goes to matters requiring compliance with the adjudicatory provisions of Sections 5, 7 and 8 of the APA. If Petitioner asserts its regulations are the promulgation of "conditions" upon certification of new transactions (Pet. Br. p. 33) rulemaking, as defined in the APA, cannot be applicable. In any event, whether rulemaking or adjudication, the Ad-

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[10] Of equal significance is the fact that in several of the cited proceedings, Commission conditioning or certification actions were reversed because they were found by the reviewing courts to be without evidentiary support. *Atlantic Refining Co.* v. *Public Service Commission*, 360 U.S. 378; *United Gas Improvement Co.* v. *Federal Power Commission*, 283 F. 2d 817, cert denied, *sub. nom. Superior Oil Co.* v. *United Gas Improvement Co.* 365 U.S. 879; and *cf. Sohio Petroleum Co.* v. *Federal Power Commission*, 298 F. 2d 465; *The Pure Oil* v. *Federal Power Commission*, 292 F. 2d 350.

ministrative Procedure Act has been flaunted by the procedures followed in promulgation of the questioned regulations.

D. Section 16 of the Natural Gas Act cannot be used to avoid the requirements of other sections of that Act or to frustrate the purposes of the Administrative Procedure Act.

In the foreword to the official Legislative History of the APA, Senator McCarran has written:

> "The Administrative Procedure Act is a strongly marked, long-sought and widely heralded advance in democratic government . . . Although it is brief, it is a comprehensive chapter of private liberty and a solemn undertaking of official fairness. It is intended as a guide to him who seeks fair play and equal rights under law, as well as to those invested with executive authority. It upholds law and yet lightens the burden of those upon whom the law may impinge . . ." p. III.

This Court has similarly interpreted that Act, saying in *United States* v. *Morton Salt Co.*, 338 U.S. 632:

> "The Administrative Procedure Act was framed against a background of rapid expansion of the administrative process as a check upon administrators whose zeal might otherwise have carried them to excesses not contemplated in legislation creating their offices. It created safeguards even narrower than the constitutional ones, against arbitrary official encroachment on private rights." 338 U.S. at 644.

This Court has said of the Natural Gas Act that the purpose of Congress was to create a comprehensive and effective regulatory scheme, *Panhandle Eastern Pipe Line Co.* v. *Public Service Commission of Indiana*, 332 U.S. 507, and that the various sections should be given only the scope

necessary for preservation of a single statutory scheme under which all rates are established initially by the natural gas companies, by contract or otherwise, and then subject to hearing and review and possible modification by the Commission, *Atlantic Refining Co.* v. *Public Service Commission*, 360 U.S. 378; *United Gas Pipe Line Co.* v. *Mobile Gas Service Corp.*, 350 U.S. 332, and that this comprehensive scheme also must protect the legitimate interests of natural gas companies which Congress intended to include in the category of the public interest. *United Gas Pipe Line Co.* v. *Memphis Light, Gas and Water Division*, 358 U.S. 103.

This Court has also held that the powers conferred under Section 16 of the Gas Act "to do the things appropriate to carry out the provisions of the Act can hardly be taken to rescind a prohibition against certain actions" which are spelled out in the other Sections of the Act, *Federal Power Commission* v. *Panhandle Eastern Pipe Line Co.*, 337 U.S. 498, 508, and that Section 16 "appropriate orders" as to rates contemplate prior completion of the precedent hearings and findings required elsewhere in the Gas Act, *Federal Power Commission* v. *Natural Gas Pipeline Co.*, 315 U.S. 575, 585. Thus, the clear and explicit statutory right to a hearing — and the concommitant duty to provide that hearing — on matters of certificates (Section 7), past rates and contracts (Section 4) and future rates and contracts (Section 5) cannot be rescinded by the power to do what is "appropriate" to carry out the provisions of these Sections (Section 16). In *Miller* v. *United States*, 294 U.S. 435, this Court said of statutory provisions such as Section 16:

> ". . . The only authority conferred, or which could be conferred, by the statute is to make regulations to carry out the provisions of the act — not to amend it." 294 U.S. at 440.

The Court of Appeals for the District of Columbia Circuit has phrased the obvious limitation the rest of the Act places on the powers to be exercised under Section 16 in this manner:

> ". . . But the broad power granted by this statutory language does not authorize an order, rule or regulation which would nullify or restrict the right of a natural gas company to change the rates under which it offers to furnish service, subject only to the requirement of Section 4(d) of the Act that it notify the Commission of the changes, so that it may proceed under Section 4(e). As the Supreme Court said in the *Mobile* opinion, 'The initial rate-making and rate-changing powers of natural gas companies remain undefined and unaffected by the Act.' An order or regulation requiring the rejection of increased rates because earlier increases were still under investigation, which Willmut suggests, would deny to United the right to change rates at which it offers service, which the *Mobile* decision says is the right of a natural gas company. *Thus, it seems clear that such an order or regulation would amount to a legislative change which is beyond the authority of the Commission.*" [Footnote omitted] *Willmut Gas & Oil Co.* v. *Federal Power Commission*, 294 F. 2d 245 (1961) at 250, *cert denied;* 368 U.S. 975, *rehearing denied*, 369 U.S. 813.

The Court below said of the Commission's action in relation to Texaco:

> "Section 16 of the Act empowers the Commission to make rules and regulations to carry out the provisions of the Act but that section is not a source of power to regulate in conflict with substantial provisions of the Act." (Notes omitted) (R. 117).

So finding, the Tenth Circuit noted that the "Commission asserts that the necessary authority flows from §§ 4,

5 and 7": (R. 117), and proceeded, as we have done here, to show that these sections require a hearing with the development of an evidentiary record[11] before Commission orders affecting practices covered by these Sections may issue. Because the statute so provides, informal rulemaking practices are not permissible, and the formal practices of Section 4(b) or the adjudicatory steps of Section 5 of the APA are the only lawful vehicles for Commission action.

Section 16 cannot be used as a vehicle to overcome the specific provisions of other sections of the Act or to legislate additional power. The only source of such additional power, if Petitioner feels such authority is needed, is Congress itself. The Court below reminded the Commission of this (R. 120) by reference to this Court's decision in *Addison* v. *Holly Hill Fruit Products, Inc.*, 322 U.S. 607:

> ". . . not infrequently administration reveals gaps or inadequacies of one sort or another that may call for amendatory legislation. But it is no warrant for extending a statute that experience may disclose that it should have been made more comprehensive . . . For the ultimate question is what has Congress commanded. . . ." 322 U.S. at 617-168 (R. 120).

The clear command of Congress in both the Natural Gas Act and the Administrative Procedure Act has been de-

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[11] In *Shields* v. *Utah Idaho Central R. Co.*, 305 U.S. 177 this Court commented on the statutory provision for a hearing in the following manner at page 182:

> ". . . The language of the provision points to definitive action. The Commission is to *'determine.'* The Commission must determine *'after hearing.'* The requirement of a 'hearing' has obvious reference 'to the tradition of judicial proceedings in which evidence is received and weighed by the trier of the facts.' The 'hearing' is 'the hearing of evidence and argument.' *Morgan* v. *United States*, 298 U.S. 468, 480" (emphasis in original.)

tailed above. That clear command requires rejection of the arbitrary and summary course followed by Petitioner in the issuance of Order Nos. 232, 232A and 242. We do not concede that experience has shown the need for a more comprehensive coverage or for added powers for the Commission. The alleged difficulties interjected here as "background" (Pet. Br. pp. 15-19) and discussed in the orders below (R. 13, 22-24) are completely without record support and are not properly before this Court. Should "background" of this nature be deemed of some assistance, we have discussed each of Petitioner's background assumptions in Appendix A, *infra*, pp. 61 to 75, wherein we show that each is completely contradicted by fact, logic, or prior court or Commission action. Even if we were to assume the validity of some of these without-evidence "findings," the Third Circuit had reason to clarify the law for the Commission on another occasion when the Commission sought to reject natural gas company filings out of hand:

> "We can understand, as the argument in this case has seemed to imply, that the Commission may have had to contemplate serious injury to the public interest because of its inability with very limited funds and staff to perform the enormous task of investigation and analysis imposed upon it in times when so many public utilities are submitting important proposals within its jurisdiction and the statutory scheme requires it to act promptly or let proposals go by default. But the remedy lies with Congress. If changes in the law are needed . . . it is not for the administrative agency or the courts to try to make up for this deficiency by taking unauthorized short cuts or indulging time saving procedures which fail to accord parties the rights which the law as written gives them . . ." *Mississippi River Fuel Corp.* v. *Federal Power Commission*, 202 F. 2d 899 at 902-903.

As demonstrated in the following section of this brief, the Commission's Section 16 authority to consolidate matters for hearing and the development of a single evidentiary record goes far toward alleviating the alleged difficulties to which the Commission has pointed.

II.

THE COMMISSION IS NOT LIMITED TO THE ALTERNATIVES OF CASE-BY-CASE DETERMINATION OR NON-HEARING, NON-REVIEWABLE RULEMAKING.

The Commission's analysis of the holding of the Tenth Circuit rests upon its contention — and its subsequent arguments aginst the position — that the lower Court's decision reduces Petitioner to "case-by-case adjudication" and precludes "resort to rulemaking" (Pet. Br., p. 19). Such is not the case, and this straw man of a case-by-case limitation on its powers, together with the atmosphere of confusion, frustration and implied damage to the public interest which Petitioner weaves around this approach should be unmasked at the outset. On this point, the holding below is directed toward the proposition that findings and orders of the Commission, which Congress specifically has made subject to review, modification or rejection by the courts, Section 19(b) of the Natural Gas Act, will not be sustained if unsupported by record evidence (R. 117). It nowhere asserts that the factual record *must be* compiled in "case-by-case adjudication."

That conclusion is purely the Commission's (R. 119).

If the statutory hearings required by Sections 4, 5 and 7 of the Gas Act and Sections 4, 5, 7 and 8 of the APA, can be provided, and the proper type of record and findings advanced on some basis other than a proceeding as

to each individually docketed filing (case) for each individual regulated natural gas company neither any argument of Texaco, nor any holding of the Tenth Circuit would restrict such procedure. If the procedure followed were lawful on other grounds, no one — to our knowledge — has asserted it would be unlawful if not "case-by-case." In its order of December 23, 1960, inaugurating *Area Rate Proceeding,* (Permian Basin) Docket No. AR61-1, 24 F.P.C. 1121, the Commission said:

> "... In order that there may be assured the development of evidentiary records containing all significant facts relevant to the determination of an appropriate price level or levels ... it is necessary and appropriate to initiate and conduct area rate hearings." 24 F.P.C. at 1122.

The order then noted that the proceeding would cover "proposed increases in rates and charges," "rates . . . not under suspension" and "the question of . . . appropriate initial rates." 24 F.P.C. at 1122. The ordering provisions are preceded by recognition that these matters were initiated pursuant to the "Natural Gas Act, particularly Sections 4, 5, 7, 14, 15 and 16 thereof." 24 F.P.C. at 1123.

As the record here indicates, the Court below only insisted on the development of an evidentiary record required by the statute (R. 117) when the Commission purports to act pursuant to Sections 4, 5 or 7 of the Natural Gas Act (R. 117-118; *cf.* R. 13, R. 24 and Pet. Br. pp. 31-38). The Commission's own action in initiating the first area rate proceeding indicates its belief that it can proceed under these same statutory authorities on something substantially

more broad than case-by-case adjudication.[12] Furthermore, the decision below specifically noted that the "problems of area pricing are not presented here" (R. 121). Certainly, Petitioner's actions since the decision below in initiating a number of consolidated proceedings for hearing pursuant to Sections 4, 5 and 7 of the Gas Act contradict the "case-by-case" shibboleth it now advances: *Sunray DX Oil Co., et al.*, Docket Nos. G-4281, *et al.*, May 28, 1963 (28 Fed. Reg. 5625) (256 cases); *Sun Oil Co., et al.*, Docket Nos. G-8592, *et al.*, August 6, 1963 (28 Fed. Reg. 8333) (25 cases); *Area Rate Proceedings, et al.* (Hugoton-Anadarko area, and Texas Gulf Coast area), Docket Nos. AR64-1 and AR64-2, *et al.*, November 27, 1963 (28 Fed. Reg. 12646) (approximately 1500 and 1000 cases respectively): *Pan American Petroleum Corp., et al.*, Docket Nos. G-19417, *et al.*, December 12, 1963 (28 Fed. Reg. 13908) (82 cases).

The necessity to proceed on an individual basis was interjected into these matters only because Petitioner insisted that review of the regulations issued through Order Nos. 232, 232A and 242 must be handled by the reviewing courts on a case-by-case basis (R. 113 and *Pan American Petroleum Corp.* v. *Federal Power Commission*, No. 387 this Term, pending). This argument has no relation to the requirement that statutory hearings be granted and records be compiled so that judicial review, however undertaken, is more than the rubberstamping of asserted agency expertise.

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[12] The printed Federal Power Commission Reports indicate, 24 F.P.C. 1121, that the lists of respondents, rate suspension proceedings, and certificate proceedings consolidated for joint hearing in this area proceeding, have been omitted in printing the order. The originals of this order indicated that literally hundreds of cases were designated to be handled in this single proceeding on a single record. Order of December 23, 1960, *Area Rate Proceedings*, Docket Nos. AR61-1, et al., Appendices A, B, and C of mimeo copy.

III.

THE COMMISSION'S THEORY OF STATUTORY INTERPRETATION DEMANDS THE INTERJECTION OF JUDICIAL AUTHORITY.

It has long been one of the accepted concepts of statutory construction that an established administrative interpretation of a statute is entitled to great weight. *United States* v. *Public Utilities Commission of California*, 345 U.S. 295; *Federal Power Commission* v. *Panhandle Eastern Pipe Line Company*, 337 U.S. 498. But the action of the Commission in issuing Order Nos. 232, 232A and 242 without hearing, and the claim that it has authority to proscribe and prescribe rates and contracts for the future or make findings as to the public convenience and necessity without formal hearing and record support is not entitled to such deference.

First, the failure of the Commission to claim the power or seek to assert it over the years since 1938, and particularly since the advent of the active regulation of producer sales, should deter a latter-day construction of the Act to now include such power — even if it were possible to so construe it. *Federal Power Commission* v. *Panhandle Eastern Pipe Line Co., supra.*

Second, administrative construction will not be permitted to override the plain language of the law. Regulations, although entitled to consideration in construing an ambiguous statute, are void when, as here, they are in direct variance with unambiguous statutory provisions. *Mid-Continent Petroleum Corp.* v. *National Labor Relations Board*, 204 F. 2d 613, *cert. denied*, 346 U.S. 856; *Hope Natural Gas Co.* v. *Federal Power Commission*, 134 F. 2d 287, reversed on other grounds, 320 U.S. 591; 73 C.J.S., Public Administrative Bodies and Procedure § 94. Such

direct conflict between the action of the Commission in the promulgation of the questioned regulations and the clear mandates of the Natural Gas Act and the Administrative Procedure Act have been traced above. Also, an administrative construction which is no sooner made than challenged, obviously, cannot turn the scale in favor of that erroneous construction. *Davies Warehouse Co.* v. *Bowles*, 321 U.S. 144.

Third, this Commission proposes to stretch its jurisdiction and authority to all "imaginative" limits, relying on the courts to restrict any enlargement which becomes too imaginative:

> ". . . we must first examine the limits of our jurisdiction. That examination must be meaningful and imaginative. Surely, if this Commission is timid or myopic in the use of its authority, it will not fulfill its responsibilities to the public interest. The fact that individual members of the Commission, segments of the industry, and of the consuming public, individual members of the Congress, or the Administration itself, may differ with a particular conclusion of the Commission on a jurisdictional matter should not distress us. For those who are affected by our decisions have full recourse to the Courts."
>
> David S. Black, Commissioner, Federal Power Commission.[13]

Certainly there is irony in the fact that the Court below found in this instance that there was not such "full recourse" because the "bootstrap" approach used was so

[13] See Federal Power Commission Press Release No. 13053, December 9, 1963. Quotation from an address by Commissioner Black to the Sixth Annual Meeting of the Mid-West Electric Consumers Association, Denver, Colorado, December 9, 1963. Printed texts of such speeches are routinely made available through the Petitioner's Office of Public Information. 18 C.F.R. § 3.4(11).

"imaginative" the courts were deprived of an opportunity to properly review the admittedly substantive rulings (R. 117). For this reason, the Tenth Circuit refused to permit the Commission to issue general orders and regulations, resist review of those orders, then apply them in specific instances, but provide no record to support either the general or the specific action. Said the Tenth Circuit: "No amount of administrative expertise can supply these deficiencies" (R. 119).

Only last term, this Court found it necessary to reject efforts of agencies, creations of statutory enactment, to substitute expertise for the clear requirement that their "findings" and actions be based upon evidence of record. Thus, in *Burlington Truck Lines* v. *United States*, 371 U.S. 156, it was held:

> "The difficulty with the order arises in connection with the findings and conclusions relevant to the choice of remedy. The assumption of the Commission was . . . that it had unlimited discretion to apply either remedy simply because either might be effective." 371 U.S. at 165.
>
> "There are no findings and no analysis here to justify the choice made, no indication of the basis on which the Commission exercised its expert discretion. We are not prepared to and the Administrative Procedure Act will not permit us to accept such adjudicatory practice . . . Expert discretion is the lifeblood of the administrative process, but 'unless we make the requirements for administrative action strict and demanding, *expertise*, the strength of modern government, can become a monster which rules with no practical limits on its discretion' . . . 'Congress did not purport to transfer its legislative power to the unbounded discretion of the regulatory body.'" 371 U.S. at 167.

This Court then went on to insist that agency discretion must be exercised and expressed in the context of the statutory standards spelled out in the particular legislative grant. The Court below, in the instant case, said precisely the same:

> "... The public interest must be related to and tested by these [statutory] standards [of 'just and reasonable' and 'public convenience and necessity']. Although the Commission is the guardian of the public interest in the administration of the Act, the Commission may not substitute its standards for the statutory standards." (R. 119)

The Court below continued:

> "... Additionally, if we should accept the legal sufficiency of the Commission's findings, we have no way of determining the factual basis for those findings because we have before us no record of facts to sustain them." (R. 119)

This fundamental requirement of due process demanded by the Tenth Circuit certainly comports with the law as reaffirmed by this Court in *Interstate Commerce Commission* v. *J-T Transportation Co.*, 368 U.S. 81:

> "We intimate no opinion on the merits, for it is the Commission not the courts, that bring an expertise to bear on the problem . . . *Yet that expertise is not sufficient by itself.* Findings supported by substantial evidence are required. *Public Service Com.* v. *United States*, 356 U.S. 421, 427; *United States* v. *United States Smelting, R. & M. Co.*, 339 U.S. 186, 193.
>
> "Since the standards and criteria employed by the Commission were not the proper ones, the causes must be remanded for further consideration and for new findings. *American Trucking Association* v. *United States*, 364 U.S. 1, 15-17 . . ." 368 U.S. at 93.

IV.

THE CASES AND ACTIONS RELIED UPON BY PETITIONER DO NOT SUPPORT AND ARE NOT AUTHORITY FOR CIRCUMVENTION OF THE CLEAR STATUTORY PROVISIONS OF THE NATURAL GAS ACT AND ADMINISTRATIVE PROCEDURE ACT.

Petitioner places primary reliance upon, and claims judicial approval for its alleged "rulemaking" effort, Order Nos. 232, 232A and 242, in this Court's decision in *United States* v. *Storer Broadcasting Co.*, 351 U.S. 192, and the decision of the Ninth Circuit in *The Superior Oil Co.* v. *Federal Power Commission*, 322 F. 2d 601, pending on petition for certiorari, No. 689, this Term. Such reliance is clearly misplaced.

In the *Superior* case, the Ninth Circuit accepted, without investigation, the erroneous premises of the Commission, which we have exposed above, and then compounded its error by also accepting *Storer* without adequate consideration of the significant and controlling statutory and factual difference between the action of the Federal Communications Commission (FCC) in that instance, and the action of the Petitioner in the instant situation. In addition, the Ninth Circuit limited its considerations to the favored nation clause in the Superior contract, 322 F. 2d at 610, and note 23, and did not discuss the reach of the Commission to the instant flexible pricing clauses.

A basic error, which precludes use of the *Superior* decision as precedent is laid bare by that Court's own words:

> ". . . The procedures to be followed in prescribing or amending administrative rules and regulations, including those of the Commission, are dealt with in section 4 of the Administrative Procedure Act, 5 U.S.C. § 1003,

> to which Superior makes no reference. The procedures followed by the Commission which led to the issuance of Order No. 242 . . . comport fully with the requirements of that statute." 322 F. 2d at 608-609.

As this Court said in *United Gas Pipe Line Co.* v. *Mobile Gas Service Corp.*, 350 U.S. 332, the "major defect of this argument is that it assumes the answer to the very question in issue," 350 U.S. at 340, and "the very premise . . . is itself based on a misconception of the structure of the Act," 350 U.S. 340-341. We have shown above that the Commission did not, because it did not provide for a hearing and the taking of evidence, comport with the requirements of the Administrative Procedure Act (Pet. Br., pp. 14, 27, 29). The same summary disposition which constituted violation of the APA, necessarily breached the specific provisions of the Natural Gas Act which also required a hearing before Petitioner could act. When the Ninth Circuit has investigated the requirements of the APA it has dismissed efforts of the Commission to avoid the statutory hearings provided for there. *Public Utility District No. 1* v. *Federal Power Commission*, 242 F. 2d 672.

At the time of passage of the APA, the Attorney General, in correspondence with Congressional leaders, cited the absence of "unanimity of recognition" of what was included in "rulemaking," Legislative History, page 225. Although the definitions in Section 2 of the APA were provided to permit avoidance of confusion such as that displayed by the Ninth Circuit in *Superior*, that Court's failure to delineate between the wholly separate formal and informal rule-making procedures of that one section, Section 4(b) of the APA,[14] led it to its equally erroneous acceptance of *Storer* as precedent for Petitioner's actions in issuing Order Nos. 232, 232A and 242.

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[14] "Attorney General's Manual on the Administrative Procedure Act," pages 31-35.

The broadcast portions of the underlying statute, which were the provisions before this Court in *Storer*, do not provide for FCC authority over the rates, charges or private contracts of those licensees who make application for use of the public airwaves. Where the Gas Act has specific requirements that hearings must precede the issuance of orders promulgating rates or contracts for the future (the rulemaking subject here), the Communications Act (47 U.S.C. 301, *et seq.*) has no statutory requirement of a prior hearing before the issuance of orders which announce "the Commission's attitude on public protection against . . . concentration" of broadcast outlets in a single licensee, 350 U.S. at 203.[15] In fact, this Court's recognition of the "policy" nature of the *Storer* rules is footnoted to the holding, but one term before, in *Federal Communications Commission* v. *Allentown Broadcasting Corp.*, 349 U.S. 358, that a hearing is required to support a determination of improper concentration," 350 U.S. at 203, note 12.

In contrast to the Ninth Circuit position, if the order reviewed in *Storer* had dealt with the actual licensing of a project, Section 4(b) of the APA could have had no applicability because licensing is defined as "adjudication" and has no relationship to "rulemaking." *Cf.* Section 2(c) of the Administrative Procedure Act with Sections 2(d) and 2(e). Because the FCC action reviewed in *Storer*

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[15] The Federal Power Commission has from time to time issued policy announcements of its attitude on matters which, when *specifically acted upon* require hearings and formal adjudication. See e.g. *Order No. 185*, 15 FPC 793, wherein the Commission advised of its attitude on "routine construction" certificate applications. Despite such a policy pronouncement, issued pursuant to Section 4(b) of the APA, individual applications for routine construction certificates are still heard, as required by the explicit requirements of Section 7 of the Gas Act. Compare also, the holding below that Order Nos. 232 and 232A could stand as "advisory declarations of Commission policy" but that "they determine no rights." (R. 121).

was merely an expression of an "attitude" and was "reconcilable with statutory directions," 350 U.S. at 203, the filing of statements under the informal rulemaking provisions of Section 4(b) of the APA was considered adequate, 350 U.S. at 193. Since the Communications Act did not require a hearing on the policy matters which were the subject of the *Storer* rules, that case cannot be precedent in the instant situation where definite practices bearing upon rates, prices, and contracts to be used in the future were promulgated (R. 20-21) and the statute specifically and plainly required that such matters be decided on the basis of the evidence after hearing — thus activating the formal requirements of the last sentence of Section (4)b of the APA.

The inapplicability of *Storer* to the present circumstances, involving the Federal Power Commission and the Natural Gas Act, is accented by further significant statutory differences between the Gas Act and the Communications Act. Congress had specifically stated in the Communications Act, 47 U.S.C. 314, that ownership or control of a number of station outlets, where the restraint of commerce or the lessening of competition would be the result, was forbidden. The FCC's policy rule merely affirmed that express statutory pronouncement. The exact opposite situation exists in the case of the regulations here. The contract and rate provision rules promulgated by Order Nos. 232, 232A and 242 are in direct contrast to the Congressional intent at the time of passage of the Natural Gas Act.[16]

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[16] In *Denver Union Stockyards* v. *Producers Livestock Marketing Association*, 356 U.S. 282 (Pet. Br., p. 25, note 25), this Court confirmed that where the Congressional policy is so clearly stated that only a definition of it is needed, specific hearings may not be required, 356 U.S. at 287, but specifically recognized that "an evidentiary hearing would be necessary" where the reasonableness of an existing practice is challenged, 356 U.S. at 288. As noted above, the Commission's powers being limited to review for "justness and reasonableness," that is precisely what was undertaken here, and a hearing was required.

In *United Gas Pipe Line Co.* v. *Memphis Light, Gas and Water Division*, 358 U.S. 103, this Court found that in relation to the Gas Act it "seems plain that Congress," in "drafting the statute" the way it did intended that natural gas companies "should not be precluded by law from increasing the prices of their products whenever that is economically necessary," 358 U.S. at 113. The rule promulgated by the Commission flies in the face of that express intent for it places added restrictions on the right to file for price increases and, in fact, specifically (and admittedly) precludes use of the very clause to which this Court was directing its attention in *Memphis* (R. 20-21; Pet. Br., p. 26, note 26). Further, while there have been completely unsupported assertions that the outlawed flexible price clauses do not relate to the economic needs of the producers, Petitioner's own past actions refute this groundless claim. Appendix A, *infra*, pp. 61 to 75.

Further important statutory differences exist which make the application of the APA to FCC action, such as that considered in *Storer,* inapplicable to Petitioner's actions and power under the Natural Gas Act. Thus, under its broadcast powers the FCC has no future rate ("rule-making," APA Section 2(c)) powers at all, either before or after hearing, the Petitioner does regulate rates, but only if upon review by it and after hearing they are found to be unjust or unreasonable; the FCC is authorized to grant licenses without hearing, 351 U.S. 204, note 14, the Petitioner under the Gas Act can only license after hearing and on the basis of the evidentiary record, Section 7; *Atlantic Refining Co.* v. *Public Service Commission*, 360 U. S. 378. Of additional import is the fact that the policy established in the *Storer* rules did not effect a shift in the statutory burden of proof. The applicant carried the same responsibilities both before and after issuance of the FCC

rules; here the burden is shifted as a result of these Commission orders, which find it sitting as judge in a waiver proceeding rather than reviewing rates on factual records. *Sunray Mid-Continent Oil Co.* v. *Federal Power Commission*, 364 U.S. 137 at 144; cf. *Federal Power Commission* v. *Sierra Pacific Power Co.*, 350 U.S. 348.

Other cases principally relied upon by Petitioner are similarly inapposite, and could have significance here only upon the assumption of certain of Petitioner's premises which have already been proven false. Thus, *Securities and Exchange Commission* v. *Chenery Corporation*, 322 U.S. 194, is presented as authority for the proposition that the choice is the Commission's whether to proceed by general or particular procedure (Pet. Br., p. 21). So be it. *Chenery* did not hold that the underlying statute can be honored when particular procedure is followed, but can be ignored in general cases. This is what Petitioner has done. In contrast, in *Chenery*, this Court held that the Securities Commission:

> ". . . was charged with the duty of measuring the proposed treatment . . . by relevant and proper standards. Only in that way could the legislative policies embodied in the Act be effectuated . . .
>
> "It could do that only in the form of an order, entered after a due consideration of the particular facts . . ." 332 at 201.

In fact, in the first *Chenery* case, the Securities Commission had been rebuffed by this Court, 318 U.S. 80, because it had not complied with the specific statutory requirements during that first proceeding. Such a rebuff is precisely what the Tenth Circuit has given to Petitioner here (R. 121).

Again, Judge Learned Hand is quoted, *National Broadcasting Co., Inc.* v. *United States*, 47 F. Supp. 940, as asserted authority for the proposition that a general rule

will not be tested when a particular case is presented (Pet. Br., p. 26-27). What could be less properly "authority" in this instance? The *NBC* case was a direct challenge to the regulations — something that Petitioner avoids here (R. 117) by urging that the general rule *can only be* tested when specifically applied (R. 115, 119). Further, Judge Hand's decision makes clear that the regulations before him were not issued until the affected companies:

> ". . . put in whatever evidence they wished and were heard before the original regulations were passed, and again at the rehearing. They at any rate were accorded all the privileges they would have had if they had intervened in an application for a license." 47 F. Supp. at 945.

The Commission further seeks to support its arbitrary violation of the statutory restrictions placed upon it by Congress by urging that there is no "constitutional right to a hearing where the subject is legislation or general rule making." (Pet. Br., p. 27). First of all, Congress has not given to the Commission the full range of Congressional powers under the Constitution; but, in contrast, it has placed the definite statutory demand for a hearing on Petitioner through the specific provisions of the Gas Act and the APA. Furthermore, the constitutionality of the Natural Gas Act has only been established in those situations where a full hearing with evidentiary record had and findings announced before the future rate practices were established, *Federal Power Commission* v. *Natural Gas Pipeline Co.*, 315 U.S. 575. While Petitioner has cited *Bi-Metallic Investment Co.* v. *State Board of Equalization*, 239 U.S. 441, and *Bowles* v. *Willingham*, 321 U.S. 503, as some authority for the above proposition the latter case illustrates the former has been severely limited, 321 U.S. at 520, and this Court said in the *Bowles* case that where

the statute provides for a hearing before the effectiveness of the agency order "due process requires" that the hearing be granted 321 U.S. at 520. Neither case negates any proposition which we have advanced, or any holding of the decision below.

At page 29 of its brief, Petitioner asserts some sort of almost irrebutable presumption for the validity of what it has done in issuing Order Nos. 232, 232A and 242. First of all, the sole issue here is the power or authority of the Commission (Pet. Br., p. 2), and not the reasonableness of the Commission's actions. Secondly, *Pacific Box & Basket Co.* v. *White*, 296 U.S. 176, cited by Petitioner, specifically shows at p. 196 (where Petitioner's partial quote also appears) that "the regulation now challenged was adopted after notice and public hearing as the *statute required.*" (This case, decided some eleven years before the APA. contains some holdings which have been negated by passage of that Act, such as its statement that the proponent of a rule does not have the burden of justification, 296 U.S. 185-186. Section 7 of the APA specifically does place the burden upon the proponent of a rule — unless a statute otherwise provides.) As has been noted earlier, the Natural Gas Act, considered in conjunction with Section 4(b) of the APA, shows that any order of the Commission regarding rates or contracts of future effect is subject to the provisions of Section 7 of the APA and Petitioner does bear the burden. Thus, neither *Pacific States* nor *American Trucking Association, Inc.* v. *United States*, 344 U.S. 298 (Pet. Br., p. 29) is applicable here.

Commencing at page 29 of its brief, and running through page 38, Petitioner discusses decisions of this Court, other courts, and its own prior actions as support for its claim that its actions in promulgating Order Nos. 232, 232A and 242 did not run in opposition to the substantive provisions

of the Natural Gas Act. As shown below, specific discussion of these cases and orders is not needed here — a goodly number being advanced to support the claim that the findings as to the "public interest" will suffice for an in *haec verba* finding using the statutory language of "present or future public convenience and necessity" or justness and reasonableness. Accepting, for argument, this proposition, the cases only show that hearings required by the Gas Act are still a condition precedent to such "public interest" findings. Petitioner also refers to this Court's holding in *Wisconsin* v. *Federal Power Commission*, 373 U.S. 294, 306. But Petitioner omits from its quotation the key holding from this page of the decision — the statement noting that the Commission's determination that the rates were acceptable in this instance had been made "on the basis of substantial evidence." Thus, Petitioner's arguments, and its citations beg the question — or actually support the holding of the Tenth Circuit below, which also demanded substantial evidence to support a "finding" going to rates, contracts or certificates. Similarly, each proceeding referred to in this section of Petitioner's brief was one in which an evidentiary hearing was held, and the reviewing court found substantial evidence to support the order, *or* reversed Petitioner for failure to build a sufficiently comprehensive evidentiary record to support its findings.

Obviously, these authorities are all opposed to any in camera, sans-record determination of matters arising as to rates, contracts or licenses under the Natural Gas Act.

V.

PRIOR COURT APPROVAL OF FLEXIBLE PRICE CLAUSES AND THE CONGRESSIONAL REFUSAL TO NEGATE THEM ARE OF SIGNIFICANCE.

Previous court approval of the now rejected contract flexible pricing clauses does support the position of the court below (Pet. Br., p. 38). First of all, the judicial enforcement and interpretation of these clauses indicates that they are not *per se* contrary to public policy or harmful to the public interest. Second, in sustaining them, the courts have found both Congressional interest in their continuation, *United Gas Pipe Line Co.* v. *Memphis Light, Gas and Water Division*, 358 U.S. 103, and practical reasons for their existence, *Shell Oil Company* v. *Federal Power Commission*, 292 F. 2d 149, *cert. denied*, 368 U.S. 915; *Memphis, supra*. This, of course, indicates that there is a clear and genuine doubt as to the merits of the totally unsupported "findings" advanced by Petitioner to support its acts. See Appendix A, *infra*, pp. 61 to 75.

We have never urged, and the Court below did not hold, that, after proper hearing and record, Petitioner could not, pursuant to specific statutory grants of power under the Gas Act, rule on such flexible clauses. But its prior actions in accepting them and finding that their activation produced just and reasonable rates, related to the economic needs of the particular producer, *Wisconsin* v. *Federal Power Commission*, 393 U.S. 294, do much to undercut the asserted reasonableness of Petitioner's rules and confirm the need for what Congress has required — and the Court below enforced — agency action only upon evidence and after hearing.

The judicial approval of these flexible clauses is most important from yet another viewpoint — this in relation

to Petitioner's point (Pet. Br., p. 39) that Congressional inaction on Petitioner's requests for legislation eliminating certain such clauses is of no significance. In the 1958 decision in *United Gas Pipe Line Co.* v. *Memphis Light, Gas and Water Division*, 358 U.S. 103, this Court found that whether in past or future contracts, it was the Congressional intent, and it was reasonable, that "natural gas companies" (which Congress knew covered independent producers) not be precluded by law from the greatest possible flexibility in increasing their prices, 358 U.S. at 113. The consistent refusal of Congress to enact the tendered legislation in the face of this clear pronouncement does have significance as to *both* past and future contracts, and cannot be limited merely to old contracts as the Ninth Circuit sought to do. But more important is the fact that Petitioner sought legislative authority to act as to both existing and future contracts, and its recommendations were not limited to a request for authority — or for Congressional action — expunging such clauses from existing contracts only. Thus, Petitioner has demonstrated its own lack of confidence in the actions now reviewed here.

VI.

PETITIONER'S ASSERTION THAT THE WAIVER PROVISIONS OF ITS RULES PROTECTED TEXACO'S VALID INTERESTS IS DISPUTED BY THIS RECORD AND PETITIONER'S OWN ACTIONS.

Petitioner asserts that Texaco failed to take advantage of the waiver provisions of Section 1.7(b) of its Rules, and that a hearing was available under these provisions (Pet. Br., pp. 11, 25). Initially, it must be noted that these waiver provisions were not a part of Petitioner's Rules at the time it issued either of its Order Nos. 232, 232A or 242. Nor

did this provision exist at the time Texaco filed its certificate application and its rate schedule (R. 22, 26, 30; 28 FPC 500, 790).

However, as the Court below found, the Commission has resisted the development of "an easy and quick method of reviewing orders which affect substantive rights and which are of general applicability" (R. 113) by urging dismissal of all actions seeking to achieve court review of these orders (R. 113). It is Petitioner's own position that review of these general orders must await impingement of a personal right by a specific order. The havoc wrought upon Texaco, *supra* p. 6, by this delay in determination of its rights has been shared by other producers, and would be compounded were Texaco required to pass through a waiver hearing before being permitted to approach the courts for adjudication of its rights.[17] Thus, waiver, if sought, would have further crippled Texaco's efforts to gain review relief, would have compounded an economic hardship already several years old, and would have further frustrated business planning and sales negotiation throughout the industry, which now looks to these cases for a general delineation of its rights.

Furthermore, the illusory nature of the Section 1.7(b) waiver relief is vividly demonstrated by Petitioner's own actions in the two *Atlantic Refining* cases to which it points (Pet. Br., pp. 25, 26). Although the waiver hearing noticed on September 13, 1962, 28 FPC 469, was held, the record of that matter, Docket No. CI 62-1562, shows that at the hearing of October 11, 1962 all of Atlantic's evidence except the name, address, and qualifications of its witness was

[17] No doubt in any court review of the waiver order Petitioner would assert that the sole test was whether the rejection of an exception to its regulations was an unreasonable "exercise of [its] judgment" (*Cf.* Pet. Br., p. 29); and would resist analysis of the underlying regulation. (R. 112)

stricken. Despite the fact that rehearing had been granted to determine the "precise meaning" of the contract terms, and whether they violated the new regulations, even Atlantic's testimony as to the meaning of the contract language was stricken. Testimony of Atlantic's witness as to the effect on it of Order No. 242 and Atlantic's reasons for inclusion of the flexible pricing clauses in the contract was also stricken. The Commission Staff adduced no evidence.

Final briefs in this matter were submitted January 11, 1963.

No action has been taken by the Examiner who heard the case. The certificate application of Atlantic is still not on file, and, thus, no sales have yet taken place.

The public record surrounding *Atlantic Refining Co.*, Docket No. CI 63-576, (Pet. Br., p. 26, note 26) is equally revealing. Although the order referred to, 29 FPC 384, purported to "preserve" Atlantic's rights, Petitioner's action has had the exact opposite effect. Atlantic had contracted for a flexible clause which paralleled the language approved by this Court in its *Memphis* decision, *supra*. Although Petitioner granted rehearing to allegedly consider the merits of its act in "forbidding" such clauses, Atlantic was suffering practical business difficulties which demanded that sales be initiated immediately.

To preserve its rights and permit rehearing Atlantic submitted an amended contract which held the "forbidden" clause in suspense, and ineffective, unless eventually found to be "acceptable". By order of May 31, 1963, reproduced herein as Appendix B, *infra*, pp. 77-78, Petitioner rejected this filing because the proscribed contract terms still ap-

peared in the document; although Petitioner accepted they were "inoperative and of no force and effect," Appendix B, *infra*, p. 77.

The Commission's files indicate that Atlantic could not hold out financially in this situation and on June 17, 1963, was forced to forego its "rights" and drop the clause completely so filings could be made. Since Atlantic no longer has the contract referred to (Pet. Br., p. 26) the promised "rehearing" or "waiver proceeding" will not materialize.

The course of these first two waiver proceedings under the new rules should conclusively demonstrate that such a course can not substitute for the statutory hearing required by Sections 4, 5 or 7 of the Gas Act and Sections 4, 5, 7 or 8 of the APA.

VII.

VENUE TO REVIEW THESE PARTICULAR ORDERS OF PETITIONER WHICH AFFECTED TEXACO WAS PROPERLY, AND FACTUALLY, IN THE TENTH CIRCUIT.

Section 19(b) of the Natural Gas Act spells out the procedures for seeking judicial review of Petitioner's orders and, in addition, provides that venue for this review is as follows:

> "Any party to a proceeding under this chapter aggrieved by an order issued by the Commission in such proceeding may obtain a review of such order in the court of appeals of the United States for any circuit wherein the natural-gas company to which the order relates is located or has its principal place of business, or in the United States Court of Appeals for the District of Columbia, . . ."

In the lower Court, Petitioner moved to dismiss Texaco's Petition for Review on the grounds that Texaco's principal

place of business is not situated in the Tenth Circuit and that Texaco is not "located" within that circuit in the sense of this statute (R. 109). Petitioner narrowly construes the term "located" and contends that term applies only to the circuit which includes the state of incorporation. The Tenth Circuit overruled the Commission's motion to dismiss for improper venue holding that the question of "location" was one of fact to be determined in each particular case and that under the facts of the instant case, venue properly lay in the Tenth Circuit (R. 109-12). Because of the uncertainty created by the Commission's continued refusal to accept the Tenth Circuit's ruling on this matter, Texaco urges that this Court clarify the venue provisions by affirmance of the decision below on this point.[18]

A. Contrary to Petitioner's assertions, a venue provision is designed for the convenience of the affected party.

The primary purpose of statutory venue provisions is the legislative intent to afford the affected parties a convenient judicial forum. Petitioner's narrow construction of the word "location" as encompassing *only* the state of incorporation is at sharp variance with this fundamental precept of venue as stated by this Court in *Panhandle Eastern Pipe Line Co.* v. *Federal Power Commission*, 324 U.S. 635:

> ". . . Venue relates to the convenience of litigants. [Citation omitted] The provisions of Section 19(b) plainly are of that character. Review in the Court of Appeals for the District of Columbia where the Commission must maintain its principal office and hold its general sessions ([June 23, 1930] 46 Stat. 797, 16

[18] See, *Gulf Oil Corporation, et al* v. *Federal Power Commission*, No. 21151 (5th Cir.) pending, where the Commission has moved to dismiss on the grounds that the petitioners there are neither incorporated in nor have their principal place of business within the Fifth Circuit.

> USCA §792, 5 FCA title 16, § 792) is convenient for the Commission. *Review in any circuit where the natural-gas company is located or has its principal place of business is designed to serve the convenience of the company . . .*" 324 U.S. at 639

The Commission (Pet. Br., p. 44, note 42) recognizes that "many corporations maintain neither offices nor employees, but only a statutory agent, in the state of their incorporation." Certainly such circumstances would not make litigation at *that* location a convenient one for any litigant so situated.

Moreover, in keeping with this Court's *Panhandle* decision, *supra*, it is doubtful that the Commission even has standing to challenge venue in a review proceeding under Section 19(b) if review is brought in a circuit other than the District of Columbia. As this Court observed in the *Panhandle* case, "Review in any circuit where the natural-gas company is located . . . is designed to serve the convenience of the company." Venue is a personal privilege which may be waived by the privileged party, but improper venue can only be challenged by the party to whom the privilege runs and who is thus inconvenienced by the wrong situs of the action. The "located" venue portion of Section 19(b) vests a venue privilege only in the natural-gas company and not in the Commission.[19]

One not uncommon situation arising under the Natural

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[19] The Commission's right to challenge venue in the instant case is further clouded by its laches. Its motion to dismiss was not filed until 80 days after the filing of Texaco's petition to review and some 45 days after it had itself certified the record to the Tenth Circuit. The certification of the record submitted this cause to the jurisdiction of the Tenth Circuit and clearly should have resulted in a waiver by the Commission of any right which it may have had to challenge venue. *Freeman* v. *Bee Mach. Co.*, 319 U.S. 448, 453.

Gas Act accents the logic and convenience afforded by the holding of the Court below.

The appellate venue provisions of Section 19(b) also determine where intervenors and Section 7(a) applicants seeking connections from long-line pipelines are required to bring appellate review proceedings. To limit such parties, whose participation in Commission proceedings is expressly authorized by the Natural Gas Act, to the circuit covering the state of incorporation or principal place of business of the natural gas company could create an extreme inconvenience for them. See for example, *Central Illinois Public Service Co.* v. *Federal Power Commission*, No. 14454 (7th Cir.) pending, where the natural gas companies affected by the order are Panhandle Eastern Pipe Line Co., a Delaware corporation with its principal place of business at Kansas City, Missouri, and Trunkline Gas Company, a Delaware corporation with its principal place of business at Houston, Texas. Here, the petitioner seeks review of acts going to new connections to be made to the lines at points in the Seventh Circuit's area. The Illinois distribution company intervenor is certainly more convenienced by having access to the Seventh Circuit, than by being forced to seek review in the Third, Fifth or Eighth Circuit as Petitioner's theory would demand. Further, such proceeding has been brought to review Opinion No. 402, *American Louisiana Pipe Line Co.*, Docket Nos. G-2306, *et al.*, issued September 17, 1963, and in the opinion the Commission itself notes that certain major arguments advanced to it "are questions of Illinois law." (mimeo, p. 21).

B. The finding of venue for Texaco in the Tenth Circuit in this case comports with the legislative intent of the statute.

The pertinent language of Section 19(b) was initially copied from Section 313(b) of the Federal Power Act.[20]

[20] U.S.C. 825l(b).

Significantly, however, the legislative history of the Gas Act shows that after Congressional committee hearings on the new bill, the words "is located" were specifically substituted for the word "resides" which appeared in the initial draft of the bill. This deliberate legislative substitution clearly reflects an intent of Congress not to limit the appellate venue provision to the state of incorporation, and the Court below so held (R. 111). At the time Congress substituted the words "is located" for "resides" there existed a long and clear line of federal decisions holding that the term "resides" as used in federal venue statutes means only the state of incorporation.[21] Since Congress is presumed to be aware of existing law and precedent when it acts, *Shapiro* v. *United States*, 335 U.S. 116, if it had intended or desired to narrow the venue provision to cover only the state of incorporation, it would have retained the word "resides."

Petitioner contends this deliberate substitution was "merely stylistic," and undertaken to replace a personal term ("resides") with an impersonal term ("located"). (Pet. Br., p. 43). The tenuous nature of this "style" argument is illustrated by the fact that Congress has been content in drafting the general federal venue statute, 28 U.S.C. 1931, to use the "personal" term "resides" to lay venue for both natural and legalistic persons and both natural and legalistic persons are covered by the Gas Act. Moreover, Petitioner's position ignores the acceptance by the court below (R. 111) of the general rule of statutory construction that a specific legislative change in phraseology made in subsequent drafts of an already drafted bill indicates that a departure from prior law and prior considerations was intended. *Cf. Shamrock Oil and Gas Co.* v. *Sheets*, 313 U.S.

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[21] These authorities are extensively reviewed and collected in *Suttle* v. *Reich Bros. Construction Co.*, 333 U.S. 163.

100, 106; *Spring City Foundry* v. *Commissioner*, 292 U.S. 182, 187; *Brewster* v. *Gage*, 280 U.S. 327, 337.[22]

Finally, the Commission asserts that failure to confine the term "is located" to the state of incorporation would make the insertion of the phrase "principal place of business" a redundant act, (Pet. Br., p. 45).[23] As will be shown, under Texaco's interpretation as adopted below no redundancy of interpretation necessarily exists, and to the extent that it might, similar redundancy occurs in Petitioner's interpretation; but, most significantly, the Tenth Circuit found the conscious Congressional change in terminology to be of far more significance than any slight overlap in phraseology (R. 111).

Texaco urged and the Court found that the requirement of being "located" in a particular circuit is met by the conduct in such circuit of substantial business operations relative to the matters under review (R. 2, 3, 109, 111). This then, is a question of fact to be determined in each particular case. *Cf. Colorado Interstate Gas Co.* v. *FPC*, 142 F. 2d 943, 950, affirmed 324 U.S. 581, and no redundancy is necessarily inherent in this interpretation. Additionally, for Petitioner to avoid its own redundancy or over-lap argument, it would have to offer assurance that no natural-gas company would ever have its principal place of business

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[22] In *Creek County* v. *Seber*, 318 U.S. 705, 714, this Court, in construing the effect of language changes in an Act of May 19, 1937, 50 Stat. 188, c 227, from an Act of June 20, 1936, 49 Stat. 1542 c. 622, stated: "We cannot accept the view that the substantial changes in language were only matters of style."

[23] In discussing this point, Petitioner erroneously represents that Texaco has urged the equation of the factual test which determined "location" with the broad interpretation given to the concept of "doing business" (Pet. Br., p. 45). Texaco, disclaimed below and disclaims here any such position. The statement of the Court below referred to by Petitioner (R. 111) was added to make clear that Court's position, and not to reject any argument made by Texaco.

in the same circuit in which it was incorporated. Reference to one example, the Sun Oil Company, a New Jersey corporation with its principal place of business at Philadelphia — both within the Third Circuit — illustrates that such assurance cannot be given.

Natural gas companies, particularly producers of natural gas, frequently conduct their business as individual proprietorships or partnerships. In fact, Petitioner's orders initiating area proceedings, *supra*, p. 30, indicates substantially more private operators named as respondents than corporations. If the provision "is located" is restricted to the state of incorporation, as the Commission urges, it would result in Congress having established a venue provision which was totally meaningless and inapplicable to a great many natural gas companies. Hence, it is actually Petitioner's own theory of an excessively narrow statutory interpretation which would fail to give effect to all provisions of the statute (Pet. Br., p. 45).

Petitioner has urged (Pet. Br., p. 18) that the regulation of natural gas companies can give rise to complex questions of contract law and interpretation. When the Commission rules on such questions through the application of the canons of contract construction it is not operating in an area of its expertise, and the reviewing court of appeals is fully justified in making its own independent determinations of the governing principles of contract law. *Texas Gas Transmission Corporation* v. *Shell Oil Co.*, 363 U.S. 263, 270. Contract interpretation raises substantive issues which, under *Erie R. Co.* v. *Tompkins*, 304 U. S. 64, are controlled by applicable state law. Thus, it is obviously sound venue policy to permit such questions of substantive contract law to be reviewed by the court in the circuit which includes the state whose laws are to be applied, rather than the court whose circuit includes only the often dis-

tant state of incorporation. The decision below permits this more practical approach (R. 111); Petitioner's position frustrates it.

Petitioner's statutory interpretation argument also ignores a significant provision in the venue section under consideration. Section 19(b) provides for review in "*any* circuit wherein the natural gas company . . . is located . . .". "Any," rather than being a term of limitation, is consistently interpretated as equivalent to "every" or "all."[24] Had Congress intended to limit "is located" to the state of incorporation, it more logically would have used the more restrictive terminology "*the* circuit" rather than the expansive "*any* circuit."

This rationale was the basis for the decision in *Roedler* v. *Vandalia Bus Lines*, 281 Ill. App. 520, 523 a suit for personal injuries brought in Saint Clair County, Illinois. Defendant moved to dismiss on the grounds proper venue lay only in Madison County, Illinois, its principal place of business. Defendant was a quasi-public corporation which under Article 2 of the Illinois Civil Practice Act could only be sued "in any county where the corporation is located." In overruling the defendant's motion, the court held:

> "'Any' is equivalent to and has the force of 'every' or 'all' . . .
>
> "Hence it would appear that the legislative intent was that such corporation could be sued in every county in which it was located. Had it been the intent that suit could only be brought in the county where the principal office was located, it would seem that the

[24] *Boyd* v. *Bell*, 203 P. 2d 618, 226 (Ariz.); *Lambert* v. *New England Fire Insurance*, 90 A. 2d 451, 455 (Me.); *Branham* v. *Minear*, 199 S.W. 2d 841, 846 (Tex. Civ. App.); *State* v. *Rosecliff Realty Co.*, 62 A. 2d 488, 490 (N.J.); *Egan* v. *Laemmle*, 25 N.Y.S. 330, 332; *Randolph County* v. *Walden*, 206 S.W. 2d 979, 983 (Mo.).

> legislature would have used the word 'the' instead of 'any' preceding the word 'county.' The word 'located' as we view the matter, used in conjunction with the expression 'any county' refers to all counties in which the corporation has a place of business or exercises its corporate power; . . .'

In construing the meaning of "is located" the doctrine of *noscitur a sociis* requires consideration of the words used in association with this term in the statute. *Polaroid Corp.* v. *C.I.R.*, 278 F. 2d 148. The use of the provision "any circuit" rather than "the circuit" clearly reflects that Congress intended "is located" to receive a broad rather than a narrow interpretation.

C. Petitioner's authorities are generally not venue cases, or are situations arising under special, limited statutes.

The lower court correctly noted that the extensive litigation under the Natural Gas Act had previously failed to produce a direct answer to the venue question raised by Petitioner (R. 109). Texaco respectfully submits that the well-reasoned holding of the Tenth Circuit below on this issue is sound both in policy and law and should be adopted by this Court.

In support of its contrary position, the Commission relies on broad dictum and the use of the words "located" and "location" by various courts in a context involving issues other than venue.[25] The parlance used by a court in dis-

[25] *National City Bank of New York* v. *Domenech*, 71 F. 2d 13, applicability of state tax to a national bank; *Stanton* v. *State Tax Commissioner*, 26 Ohio App. 198, 159 N.E. 340, domicile of corporation for purposes of intangible personal property tax; *Carter* v. *Spring Perch Company*, 113 Conn. 636, 155 Atl. 832, effect of Articles of Incorporation upon directors' right to move a plant to another state; *San Jacinto National Bk.* v. *Sheppard*, 125 S.W. 2d 715 (Tex. Civ. App.), scope of tax exemption statute.

cussing legal issues unrelated to the question of venue is neither basis nor authority for deciding the venue issue in the instant case.

Petitioner further places reliance upon a series of cases involving suits against national banking associations. Such decisions are *sui generis* since national banks are unique corporate entities which owe their existence entirely to special federal laws. As such, they have no state of incorporation and are not deemed citizens of the states in which they do business. As agents of Congress, they could not be sued without consent. 7 Am. Jur., *Banks*, §§ 7-12. Therefore, special statutes establishing requirements for jurisdiction and venue were passed.[26] Such statutes permit suits in federal courts against a national banking association only in the district where it is "established," 12 U.S.C. 94. Nevertheless, Petitioner relies on a series of cases holding "established" means the principal place of business specified in the organization charter.[27] The interpretation given by the courts to the term "established" under the national bank statutes is in no way determinative of the meaning of "is located" under Section 19(b) of the Natural Gas Act. Moreover, by equating "established" with principal place of business rather than state of incorporation, these cases would create a total redundancy in Section 19(b) if deemed controlling as to the proper interpretation to be given "is located."

At page 47 of its initial brief, the Commission quotes in part from the opinion of the City Court of New York

[26] These statutes are fully set forth and analysed in *Mercantile National Bank at Dallas* v. *Langdeau*, 371 U.S. 555.

[27] *Leonardi* v. *Chase National Bank of City of New York*, 81 F. 2d 19; *Buffum* v. *Chase Nat. Bank of City of New York*, 192 F. 2d 58; *International Refugee Organization* v. *Bank of America*, 86 F. Supp. 884; *Schmidt* v. *Tobin*, 15 F. Supp. 35.

in *Raiola* v. *Los Angeles First National Trust & Savings Bank*, 233 N.Y.S. 301, 302, 133 Misc. 630. This was an action in a state court against a national bank which, for the reasons stated above, provides an extremely limited precedent. Statutory provisions, 12 U.S.C. 94, permit actions to be brought in the state courts against national banks in any state, county or municipal court "in the county or city in which said association is located." In granting the motion to dismiss of the defendant, whose principal place of business was Los Angeles, California, the New York City Court relied on *First National Bank of Charlotte* v. *Morgan*, 132 U.S. 141, which found:

> "... This exemption of national banking associations from suits in state courts, established elsewhere than in the county or city in which such associations were located, was, we do not doubt, prescribed for the convenience of those institutions, and to prevent interruption in their business that might result from their books being sent to distant counties in obedience to process from state courts."

This reasoning is exactly the policy consideration which Texaco urges this Court recognize in determining whether Texaco shall have access to the Tenth Circuit for review of Commission orders affecting its business activities carried on and managed from offices in that circuit. When not dealing with national banking associations, the New York courts have interpreted "is located" in state venue statutes to apply not only to the principal place of business, but to any branch office. *Dairy Sealed, Inc.* v. *Ten Eyck*, 288 N.Y.S. 641, 159 Misc. 716.

Finally, the Commission relies upon dictum from this Court's decision in *Cope* v. *Anderson*, 331 U.S. 461, 467, involving no issue of venue but rather the question of the situs of a cause of action for statute of limitation purposes

(Pet. Br., p. 48). The partial quotation offered is clearly not in point, dealing as it does only with the question of the citizenship of a national bank for purposes of federal diversity jurisdiction and not with venue questions.

There remains one additional argument advanced by Petitioner which should be noted. Petitioner urges that a narrow interpretation of the venue provisions of Section 19(b) will tend to limit "forum shopping" (Pet. Br., p. 40). To suggest that some of the federal Courts of Appeal are less qualified or less fair to litigants than others is to show the utmost disrespect for these highest courts of right in our federal judicial system. Petitioner's concern over the alleged problem of "forum shopping" is totally without foundation in this record, without merit, and, we assert, should be bruskly dismissed by this Court.

On the basis of the legislative history, controlling principles of statutory interpretation, sound public policy, and the uncontested facts of record the ruling of the lower court with respect to the venue provisions of Section 19(b) should be affirmed. This ruling recognizes that the requirement of venue is predicated upon the concept of insuring a convenient forum for the parties. The narrow interpretation urged by Petitioner of limiting "location" to the state of incorporation is completely contrary to this principle, disruptive of smooth administration of the Natural Gas Act and contrary to principles of statutory construction as considered in the applicable case law.

CONCLUSION

For the foregoing reasons the decision and judgment of the Tenth Circuit in No. 7217, below, should be affirmed.

Respectfully submitted,

TEXACO INC.
ALFRED C. DECRANE, JR.
JAMES J. FLOOD, JR.
WILLIAM K. TELL, JR.
P. O. Box 52332
Houston, Texas 77052

P. R. WIMBISH
P. O. Box 2420
Tulsa 2, Oklahoma

By .....
Alfred C. DeCrane, Jr.

Of Counsel:

PAUL F. SCHLICHER
135 East 42nd Street
New York 17, New York

March, 1964

APPENDICES

APPENDIX A

1. The Commission's background arguments and asserted reasons for acting are disputed by its own statements and actions.

Only last term this Court had occasion to remark: "The courts may not accept appellate counsel's post hoc rationalizations for agency action." *Burlington Truck Lines* v. *United States*, 371 U.S. 156 at 168; *cf. Lawn* v. *United States*, 355 U.S. 339 at 354 (court review limited to the certified record); *McClellan* v. *Carland*, 217 U.S. 268 at 283. Petitioner's brief, particularly pages 15-19 thereof, and the entirety of the brief *Amici Curiae* urged by the California Public Utilities Commission,[1] are devoted to such rationalizations and non-record matters.[2]

Texaco disputes these assertions and contends that substantial evidence could have been adduced (had the opportunity been granted) to establish the inaccuracy of these rationalizations and alleged "findings."

We have argued and briefed the true issue of "power to act" in the main portion of this brief. While we are confident this Court will not accept what it "may not accept," *Burlington, supra*, we feel constrained to correct, by logic and reference to prior actions of Petitioner, the erroneous implications flowing from its background argu-

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[1] Hereinafter referred to as "Cal. Br."; and the covering motion, as "Cal. Motion." Texaco and Pan American have filed a joint answer to the California motion resisting acceptance of the tendered brief on the grounds that it is addressed only to so-called "salient reasons" for the regulations challenged here (Cal. Br., p. 5), although it recognizes that the true "issue" before the court goes only to the "power" of the Commission (Cal. Motion, p. 2).

[2] Petitioner's brief, pp. 15-19, contains reference to but one record page (R. 24), itself a statement of conclusions unsupported by any evidence.

ments. We have placed these remarks in this separately-covered Appendix to insure that they do not cloud the actual issues before the Court.

Petitioner asserts that the decision below requires that it deal with "the subject" (the validity of prices and contract provisions) on a "case by case" basis (Pet. Br., p. 15). Quite to the contrary, the record establishes that it was the Commission, not the Court below, which asserted that "case by case" review was the alternative to the informal rulemaking approach first used (R. 119). The Tenth Circuit specifically noted that the "problems of area pricing are not presented here" (R. 121). Thus, its decision could not have foreclosed consideration of "the subject" of the justness and reasonableness of rates and contracts or the present or future public convenience and necessity on a consolidated or generalized basis. All that the Tenth Circuit required was the granting of the "statutory right to a hearing" (R. 121), thus to provide a "record of facts" against which a reviewing court could test the legal sufficiency of the Commission's findings (R. 119).

Petitioner further alleges that flexible pricing clauses "move the producer's price to the highest prevailing level" (Pet. Br., p. 15), and that such increases are provided "Whenever a higher price is paid" (Pet. Br., p. 15, note 14). This record shows that under pricing provisions such as those Petitioner has declared unlawful, prices do not indiscriminately rise. The very clauses of record will operate but once or twice in the next twenty years (R. 51, 88)—hardly "whenever a higher price is paid." Furthermore, strict tests for comparability of gathering, compression, quality, dehydration or any other matter having a bearing on price "must be taken into account" before some other price can influence the prices for the sale at issue (R. 51-52). Clearly, something substantially below "the highest prevailing level" can result from such a comparison.

At page 16 of its brief, Petitioner comments on the purported transition from a "sellers' market" to a "buyers' market"; on an alleged "flood of increased rate filings" to which flexible price clauses are said to have "greatly contributed;" and on the upward trend of wholesale prices. No better illustration of the need for the development of record facts could be found. Wholesale price averages are a combination of prices under past sales contracts and prices for new sales commitments. If a "sellers' market" follows upon a "buyers' market," as the Commission asserts it has, it must be because of general supply inadequacy. When this happens, it is the prices for the currently contracted new supplies which increase, thus raising the average price of all sales. Further, as an extractive industry gears to a crash exploration and development program to provide urgently needed increased supplies, it must necessarily range wider (to difficult mountain and treacherous offshore areas) and drill deeper (15,000 to 20,000 feet) to seek previously untapped sources of gas supply. Necessarily greater financial burdens pile upon an extractive industry pushing the horizons of its activity to seek out these new, more-difficult-to-reach sources of supply, increasing the outgo of funds and demanding increased revenues from present sales. *United Gas Pipe Line Co.* v. *Memphis Light, Gas and Water Division*, 358 U.S. 103, 113.

The rising new prices obviously increased the weighted average of wholesale prices of all natural gas (Pet. Br., p. 16, note 15), but such bald references give no indication of the role price increases for existing sales played in this rise, nor do such assertions give any basis for a determination of the part the so-called indefinite clauses, as opposed to the role "permissible" increases, played in such a rise. What numerical portion of the 735 increases (Pet. Br., p. 16, note 17) derived from "permissible" as opposed to "forbidden" clauses is significant, but never explored, and issues

such as these can never be clarified without an evidentiary record. Despite the broad condemnation of clauses in the regulations, the initial producer "rule-making" proceedings did not purport to consider the full range of clauses which the Commission eventually outlawed (R. 15-17, 21). Also, there is no record to show what portions of the increases flowing from allegedly indefinite pricing clauses were created by each of the various kinds of now-outlawed clauses. Obviously, clauses such as those in the contracts of record (R. 51, 88) could not have contributed to any "flood" unless the specific time for their effectiveness had arisen.

Turning to the question of timing:

"Timing of increased rate filings," says Petitioner (Pet. Br., p. 17) enters into the problem because under flexible price clauses an increase might be contractually provided at a time "quite unrelated to the producer's economic need."[3] Reason stumbles at the claim that the "definite" price clauses in the contracts before this Court (R. 50-51, 87) demonstrate a greater relationship to the producer's economic need than the "forbidden" clauses in the same contracts (R. 51-52, 88). Each type of increase will happen at a particular stated time, and the price to be charged will be determined with specificity before it is filed and becomes effective. Further, and directly refuting its concern over timing of increases, the Commission has argued (Pet. Br., p. 18, note 21) that its regulations do not limit the "number of times" increases may be filed nor the "level" which can be filed for. If a producer is still supposedly free to contract to file for increases at any time to any level, the new regulations obviously do not reasonably

[3] The "record" reference provided at this point by Petitioner, is, of course, not to facts of record but only to similar conclusionary and unsupported statements appearing in its general orders.

counteract the alleged ills which the Commission advances as reasons for their issuance.

And the question of economic need:

Is it the economic need of the particular producer that concerns the Commission, or economic need of all producers in an area, or, perhaps, just a sample of producers in an area?

Under the "area" approach to producer regulation now being urged by Petitioner, see *Wisconsin* v. *Federal Power Commission*, 373 U.S. 294, it is claimed that "just and reasonable" and, presumably, economically-needed rates do not depend upon cost or economic presentations by the particular producer seeking a price increase. (In fact, evidence of individual producer economic need has been forbidden in these proceedings.) As phrased by Petitioner in its *Statement of General Policy No. 61-1*, 24 F.P.C. 818 at 820:

> ". . . we will, in determining whether the higher price is justified, not necessarily consider only the fundamental requirements of the individual producer proposing the price, but will consider all of the above elements relevant *to the industry* in the area concerned."

In oral argument to this Court in the *Wisconsin* case, *supra*, Petitioner's General Counsel described its thinking on the economic need point:

> "MR. SOLOMON: . . . having gone through this difficult process for the first time in a major rate case, the Commission, as of that date, and the Commission as of this date, also was convinced that individual-company, cost-of-service pricing for independent producers of natural gas who are selling a commodity, gas, to the pipelines, was not a feasible, workable, meaningful way of regulating this problem."
>
> Argument of January 9, 1963, Tr. 47-48.

We urge that Petitioner cannot have both arguments — it cannot strike price clauses by arguing individual economic need, but judge prices without concern for individual economic need.

We further urge notation of the inconsistency in Petitioner's argument on the one hand about a single producer's economic need (Pet. Br., p. 17) and its claim on the other hand that there are "no significant variations" in the situations of hundreds or thousands of individual producers (Pet. Br., p. 21). Obviously, if the latter claim is true then Producer A does have an economic need for an increase at the time of the "fortuitous" circumstances of Producer B negotiating a higher price.

Petitioner is further inconsistent in asserting that "the producer's economic need" can somehow be a standard for the *filing* of an increase but not a standard for the *approving* of the increase. This, in turn, parallels the inconsistency of arguing at one page that "fortuitous circumstances" of timing of price increase filings must be avoided (Pet. Br., p. 17), and then arguing but two pages later that producers should use short-term contracts, at the termination of which they will be free to make rate increase filings "fortuitous" as to *both* time *and* amount.

Small wonder this Court demands that there be evidence, together with findings and analysis justifying agency action lest "*expertise*, the strength of modern government, . . . become a monster which rules with no practical limits on its discretion." *Burlington Truck Lines* v. *United States*, 371 U.S. 156 at 167.

At page 17, Petitioner further alleges that the existence of the "forbidden clauses" frustrate its certificate responsibility because (1) it cannot determine in advance when increases may be filed, and (2) it cannot estimate economic

feasibility of projects without knowing a "predictable ceiling upon the cost of supply." As to (1):

(a) Petitioner's regulations do not forbid increased tax reimbursement provisions (R. 20) although the time and amount of their effectiveness cannot be known in advance,

(b) A number of the clauses now outlawed, including those in this record (R. 51, 88) do provide a definite time "when the producer will be able to file,"

(c) Petitioner objects to clauses permitting an "indefinite increase," yet the regulations as promulgated (R. 20) and the use of short-term contracts as advocated (Pet. Br., p. 19, note 21) provide indefinite increase possibilities,

(d) Pipeline natural gas companies can use "Memphis clauses" permitting the filing of an increase at any time,

(e) Contrary to its present position that it must forecast future events, Petitioner has previously urged that at the time of certification, "the Commission should not be required to speculate as to the facts that may exist twenty years or more in the future." *Sunray Mid-Continent Oil Co. v. Federal Power Commission*, 364 U.S. 137, Brief of the Federal Power Commission, p. 29.

As to (2), the indefiniteness of gas supply costs:

(a) State commissions have for years been required to estimate the economic feasibility of projects despite the fact that the supplying interstate pipelines, can and do, with Petitioner's approval, retain the right to file at any time for any amount of a rate increase,

(b) Petitioner's short-term contract suggestion would make the determination of economic feasibility even more difficult to ascertain since *both* the assurance of the supply *and* the price ceiling would be indefinite,

(c) We are uncertain how the Commission could make a firm analysis of project-long projected purchase gas cost under the rolled-in rate approach which it advocates, *Battle Creek Gas Co.* v. *Federal Power Commission*, 281 F. 2d 42, since each later expansion, or mere purchase of additional system gas supplies, will have a presently unknown effect on the cost of gas supply of the first project.

Petitioner next asserts that the interacting and cumulative effect of the "forbidden" clauses will tend to bring all prices to a given level throughout the area. Subject to the qualifications noted above about the necessary limitation of reaction of one price to a higher non-comparable purchase in the area, and also subject to the recognition that the areas in these pricing clauses (R. 51, 88) are substantially more narrow in scope than Petitioner's delineated pricing areas, 24 F.P.C. 818, the result complained of really produces a reaction which is consistent with the producer regulatory theory now being espoused by the Commission. If the goal of the Commission is to achieve prices "for the gas itself from any source questioned," 24 F.P.C. at 820, producers should be permitted a vehicle which allows a filing to that level.[4]

"Another serious factor" allegedly arising from the existence of the now-forbidden clauses is the purported need for "contract interpretation" by Petitioner, a process which it is said could delay disposition of producer price increase matters (Pet. Br., pp. 17-18). First, we note that it is not

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[4] ". . . The effect of a contract clause of this type, of course, is only to permit the producer to resort to the filing provisions of § 4(d) of the Act. . . . Thus we have sustained the right of a seller to file an increase under a contract which, in effect, authorized him to do so at any time. *United Gas Pipe Line Co.* v. *Memphis Light, Gas and Water Division*, 358 U.S. 103. The . . . clauses here are far more limited in scope, depending as they do on the occurrence of external events." *Wisconsin* v. *Federal Power Commission*, 373 U.S. 294 at 304.

necessary for the contract question to be finally settled before the rate is tested. See *Wisconsin* v. *Federal Power Commission*, 373 U.S. 294 at 301; 24 F.P.C. 537, at 577. If the rate would not be just and reasonable, regardless of the right to file for it, the matter can be just as quickly disposed of in that manner. Second, the new regulations allow continuance of increased tax reimbursement clauses (R. 20). However, these "acceptable" clauses are presently giving rise to a number of rate change filings disputed as to contract right. See e.g., *Skelly Oil Co. et al.*, Docket Nos. RI64-13, *et al.*, order of October 10, 1963; *The Pure Oil Co. et al.*, Docket Nos. RI64-28, *et al.*, order of July 24, 1963. Obviously mere dispute does not provide a basis for prohibition of certain pricing clauses.

We also note that the new regulations do not necessarily eliminate the need for these "contract" hearings. The *Atlantic* order referred to by Petitioner (Pet. Br., pp. 25-26) was issued because:

> "... the language of the pricing provisions in Atlantic's contract is equivocal and we deem that a hearing should be held to determine their precise meaning and whether in fact such provisions are proscribed by Section 154.93."
>
> *Atlantic Refining Co.*, 28 F.P.C. 469.

The regulations may well have just substituted one type of contract hearing for another.

Also, on the contract hearing question, it is settled that the Commission has no special expertise in the decision of such questions, *Texas Gas Corp.* v. *Shell Oil Co.*, 363 U.S. 263 at 268, and, thus, they can be settled in other forums better equipped to dispose of such contract matters. Any need for expedition could be achieved by a simple directive that the dispute be settled in the state or federal court having jurisdiction over the question. Nor do the delays

surrounding these matters arise in quite the manner Petitioner would imply (Pet. Br., p. 18). For example, the "thirty-eight" filings referred to, which were "tendered four years ago" are just now before the courts because of the following chain of events:

(a) The first of these increases was filed with the Commission about March 1, 1959. (See unreported order, *Shell Oil Co., et al.*, Docket Nos. RI61-515, *et al.*, issued June 26, 1961.)

(b) By an order issued on June 24, 1961, a hearing on the contract issue, was set to commence on July 24, 1961 — more than two years after the first of the increases was filed.

(c) The hearing, which consumed only thirteen actual hearing days, was, because of recesses, not concluded until November 20, 1961, and final briefs were received on April 19, 1962, 29 F.P.C. at 511.

(d) The presiding examiner who had heard the matters died during the briefing period; a new examiner was not appointed until May 21, 1962, 29 F.P.C. at 511-512.

(e) This examiner's initial decision was entered on July 24, 1962, 29 F.P.C. at 510.

(f) After the filing of exceptions, the Commission opinion did not issue until March 15, 1963, although the majority state "[t]he examiner's decision, and the *Pure Oil* opinion upon which it is based, fully dispose of this case," 29 F.P.C. 498, 503.

(g) Rehearing was denied by the Commission on April 26, 1963, 29 F.P.C. 851.

Clearly, the out-of-hand, without-record-support rejection of contracts and the setting aside of contract price clauses

is not supported by pointing to self-inflicted delay in some limited case.

Petitioner has also argued that it must be given a "prompt and comprehensive" mechanism of control to avoid a regulatory breakdown (Pet. Br., pp. 18-19). In the specific sections of the Natural Gas Act, Congress has provided the only means of regulatory control which it expects this agency to follow. Merely because, after ten years of active producer regulation, the Commission still has not settled upon the major principles by which to test the justness and reasonableness of producer sale prices and contracts is no reason to now judicially give it plenary authority to act. Certainly "prompt and comprehensive" action could be had if Petitioner were merely to set prices firmly and finally, without hearing or evidence, and then were to reject all other prices. But Congress did not grant such power, *Bowles* v. *Willingham*, 321 U.S. 503, and Petitioner has been told:

> "If changes in the law are needed . . . it is not for the administrative agency or the courts to try to make up for this deficiency by taking unauthorized short cuts or indulging time saving procedures which fail to accord parties the rights which the law as written gives them."
>
> *Mississippi River Fuel Corp.* v. *Federal Power Commission*, 202 F. 2d 899, at 903.

This is, of course, derivative from the principles reiterated in this Court's instruction in *Burlington Truck Lines* v. *United States*, 371 U.S. 156:

> "'Congress did not purport to transfer its legislative power to the unbounded discretion of the regulatory body.' . . . The agency must make findings that support its decision, and those findings must be supported by substantial evidence. . . . Here the Commission made

no findings specifically directed to the choice between two vastly different consequences . . . Nor did it articulate any rational connection between the facts found and the choice made . . .

". . . Commission counsel now attempts to justify the Commission's 'choice' of remedy . . ." 371 U.S. at 167, 168.

The Court below saw it this way:

"The Commission held no hearings relative to the promulgation of Order Nos. 232, 232A and 242. Nevertheless, the Commission made findings allegedly justifying such orders. . . .

". . . the Commission may not substitute its standards for the statutory standards. Additionally, if we should accept the legal sufficiency of the Commission's findings, we have no way of determining the factual basis for those findings because we have before us no record of facts to sustain them." (R. 118, 119).

2. The arguments of California are equally erroneous and contrary to provable fact.

The factual arguments sought to be interjected into this proceeding by California are similarly without record support, and are directly disputed by Texaco. California asserts that "[p]rice can *definitely* be stated and fixed for the full term of the contract. The Commission, in the exercise of its judgment, has recognized this." (Cal. Br. p. 6, emphasis in original). No reference, record or otherwise, is offered. We have shown above that, quite to the contrary of this claim, the Commission has told this Court that it cannot "speculate as to facts that may exist twenty years or more in the future," and no reason has been offered why producers can necessarily do so. Also, the Third Circuit has found:

". . . The motivation behind the periodic price adjustments [provided by 'flexible' and 'indefinite' price

> arrangements] is recognition of the probabilities of normal price variation in gas during the long duration of the contract. *The principle makes sense against any contrary view that might be urged.* Particularly is it desirable as compared to an attempt to state rigid price figures for the whole future twenty-five year operation." *Shell Oil Co.* v. *Federal Power Commission*, 292 F. 2d 149, at 152 *cert. denied*, 368 U.S. 915.

This Court viewed the advantage of the *totally* indefinite "Memphis clause" in the following manner:

> ". . . Business reality *demands* that natural gas companies should not be precluded by law from increasing the prices of their product whenever that is the economically necessary means of keeping the intake and outgo of their revenues in proper balance; . . ." *United Gas Pipe Line Co.* v. *Memphis Light, Gas and Water Division*, 358 U.S. 103, at 113.

As also noted earlier, contrary to the California position (Cal. Br., p. 7), flexible price clauses are fully consistent with the Commission's area approach since producers should not be deprived of the right to file for and receive the "fair price for the gas itself" which we are promised will emanate from such a proceeding.

California's second argument (Cal. Br., pp. 7-9) has been fully answered above wherein it has been shown that increases under the "forbidden" clauses are not automatic as California asserts; that the alleged contract disputes are not numerous, are not eliminated by the regulations, and need not drag out as occurred in one isolated situation; and that no additional test is needed of the Phillips' spiral clauses, 24 F.P.C. at 577, because the merits can be, and in that particular case were, decided before the "contract right" to all or some portion of the increase was settled — all without undue confusion.

California, too, argues (Cal. Br., pp. 9-10) that the price increases authorized by the so-called indefinite pricing clause necessarily "generate rate increase filings which have no relationship to the requirements of the company seeking the increase." It is further asserted that "a duty is placed upon the regulated producer to ask for rates it can justify on the basis of the proved requirements of the company." It is important to note first of all that California's demand is never made more specific than some vague reference to "requirements" and for ten years (since this Court's 1954 decision in *Phillips Petroleum Co.* v. *Wisconsin*, 347 U.S. 672), regulated producers have sought to fathom what quantom of proof, what requirements, are needed to support increases, *however arising in their contracts*. It would be a most startling turn of events if producers were now to be denied the right to "resort to the filing provisions of § 4(d) of the Act" on the grounds their filings don't meet their "requirements" when the regulated companies and this Court are still awaiting "the ultimate solution" to the question of what is the requirement. *Wisconsin* v. *Federal Power Commission*, 373 U.S. 294 at 304, 310.

Of course, since California gives absolutely no dimension to its "requirements" criterion there is no basis to judge why the "fortuitous event" of five years passing between fixed escalations more nearly guarantees that these nebulous and ephemeral "requirements" will be met than does the "fortuitous event" that ten or fifteen years have passed and the parties are to renegotiate — taking full cognizance of the sales conditions at the time of the renegotiation (R. 52).

One remaining point should be emphasized. In 1957, the Commission set Texaco for a formal hearing on a number of increased rates, some of which arose from so-called

indefinite escalation clauses. Drawing on the evidence, the examiner ruled (on the basis of the cost-of-service test which California has argued to this court is the proper test, *Wisconsin* v. *Federal Power Commission*, 373 U.S. 294 at 308) that Texaco should be discharged from any obligation to make refunds since it had shown its economic need for the increased rates. *Texaco Inc.*, Docket Nos. G-8969, *et al.*, decision of January 23, 1963.[5]

This Appendix has been included because Petitioner, now joined by California, continues to assert the truth of "alleged findings" not of record and to assert points which we have never been permitted to cross-examine or rebut. We, thus, were compelled to include this showing of the clear lack of probable validity of these so-called "findings" lest our silence be interpreted as agreement.

[5] The twenty-two contracts in this proceeding were eventually considered along with some one hundred-fifty other Texaco gas sales contracts in general settlement discussions which led to a proposal approved by Commission order of December 30, 1963.

APPENDIX B

FEDERAL POWER COMMISSION
Washington 25

Docket No. CI63-576
The Atlantic Refining Company

May 31, 1963

The Atlantic Refining Company
P. O. Box 2819
Dallas 21, Texas

Attention: Mr. Edward J. Kremer, Jr., Attorney

Gentlemen:

This is with reference to the resubmission of your application, filed in Docket No. CI63-576 on February 11, 1963, and the related contract dated July 30, 1962, with Montana-Dakota Utilities Company covering a sale of gas from acreage in the Riverton Dome Field, Fremont County, Wyoming.

Atlantic's original application filed in this docket on October 30, 1962, was rejected by the Commission because the related July 30, 1962, contract with Montana-Dakota contains pricing provisions other than those permitted by Section 154.93 of the Commission's regulations under the Natural Gas Act. In this resubmittal of that application and contract Atlantic has not deleted the proscribed pricing provisions (Sections 10.5 and 10.6 of Article X of the contract), but has instead amended the contract to provide that the said provisions are declared to be inoperative and of no force and effect so long as they are lawfully forbidden as pricing provisions in contracts filed with the Commission as rate schedules.

This amendment does not meet the requirements of the regulation. Section 154.93 itself sets forth that the proscribed pricing provisions "• • • shall be inoperative and of no effect at law" and further requires that any contract executed after April 2, 1962, containing such provisions shall be rejected. Therefore, it is apparent that the proscribed provisions, even though of no effect at law, cannot be contained in contracts filed with the Commission.

In addition, the Commission has granted in this docket the application of Atlantic for rehearing on the rejection of the original application in order to consider whether or not Section 154.93 should be amended or modified to permit pricing provisions like those contained in Atlantic's contract with Montana-Dakota and, consequently, any further action in this docket should more than likely await the Commission's determination of that issue.

Very truly yours,

J. H. Gutrides
Secretary

Copy to:

Mr. Bernard A. Foster, Jr.
Ross, Marsh & Foster
725 Fifteenth Street, N. W.
Washington 5, D. C.

Montana-Dakota Utilities Co.
831 Second Avenue South
Minneapolis 2, Minnesota

APPENDIX C

The Administrative Procedure Act, 60 Stat. 238; 5 U.S.C. 1001, *et seq.*, provides, *inter alia*, as follows:

SEC. 2. As used in this Act —

• • •

(c) RULE AND RULE MAKING. — "Rule" means the whole or any part of any agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or to describe the organization, procedure, or practice requirements of any agency and includes the approval or prescription for the future of rates, wages, corporate or financial structures or reorganizations thereof, prices, facilities, appliances, services or allowances therefor or of valuations, costs, or accounting, or practices bearing upon any of the foregoing. "Rule making" means agency process for the formulation, amendment, or repeal of a rule.

(d) ORDER AND ADJUDICATION. — "Order" means the whole or any part of the final disposition (whether affirmative, negative, injunctive, or declaratory in form) of any agency in any matter other than rule making but including licensing. "Adjudication" means agency process for the formulation of an order.

(e) LICENSE AND LICENSING. — "License" includes the whole or part of any agency permit, certificate, approval, registration, charter, membership, statutory exemption or other form of permission. "Licensing" includes agency process respecting the grant, renewal, denial, revocation, suspension, annulment, withdrawal, limitation amendment, modification, or conditioning of a license.

• • •

SEC. 5. In every case of adjudication required by statute to be determined on the record after opportunity for an agency hearing, except to the extent that there is involved (1) any matter subject to a subsequent trial of the law and the facts de novo in any court; (2) the selection or tenure of an officer or employee of the United States other than examiners appointed pursuant to section 11; (3) proceedings in which decisions rest solely on inspections, tests, or elections; (4) the conduct of military, naval, or foreign affairs functions; (5) cases in which an agency is acting as an agent for a court; and (6) the certification of employee representative —

(a) NOTICE — Persons entitled to notice of an agency hearing shall be timely informed of (1) the time, place, and nature thereof; (2) the legal authority and jurisdiction under which the hearing is to be held; and (3) the matters of fact and law asserted. In instances in which private persons are the moving parties, other parties to the proceeding shall give prompt notice of issues controverted in fact or law; and in other instances agencies may by rule require responsive pleading. In fixing the time and places for hearings, due regard shall be had for the convenience and necessity of the parties or their representatives.

(b) PROCEDURE — The agency shall afford all interested parties opportunity for (1) the submission and consideration of facts, arguments, offers of settlement, or proposals of adjustment where time, the nature of the proceeding, and the public interest permit, and (2) to the extent that the parties are unable so to determine any controversy by consent, hearing, and decision upon notice and in conformity with Sections 7 and 8.

(c) SEPARATION OF FUNCTIONS — The same officers who preside at the reception of evidence pursuant to section 7

shall make the recommended decision or initial decision required by section 8 except where such officers become unavailable to the agency. Save to the extent required for the disposition of ex parte matters as authorized by law, no such officer shall consult any person or party on any fact in issue unless upon notice and opportunity for all parties to participate; nor shall such officer be responsible to or subject to the supervision or direction of any officer, employee, or agent engaged in the performance of investigative or prosecuting functions for any agency. No officer, employee, or agent engaged in the performance of investigative or prosecuting functions for any agency in any case shall, in that or a factually related case, participate or advise in the decision, recommended decision, or agency review pursuant to section 8 except as witness or counsel in public proceedings. This subsection shall not apply in determining applications for initial licenses or to proceedings involving the validity or application of rates, facilities, or practices of public utilities or carriers; nor shall it be applicable in any manner to the agency or any member or members of the body comprising the agency.

(d) DECLARATORY ORDERS — The agency is authorized in its sound discretion, with like effect as in the case of other orders, to issue a declaratory order to terminate a controversy or remove uncertainty.

• • •

SEC. 7. In hearings which section 4 or 5 requires to be conducted pursuant to this section —

(a) PRESIDING OFFICERS. — There shall preside at the taking of evidence (1) the agency, (2) one or more members of the body which comprises the agency; or (3) one or more examiners appointed as provided in this Act; but nothing in this Act shall be deemed to supersede the conduct of specified classes of proceedings in whole or part

by or before boards of other officers specially provided for by or designated pursuant to statute. The functions of all presiding officers and of officers participating in decisions in conformity with section 8 shall be conducted in an impartial manner. Any such officer may at any time withdraw if he deems himself disqualified; and, upon the filing in good faith of a timely and sufficient affidavit of personal bias or disqualification of any such officer, the agency shall determine the matter as a part of the record and decision in the case.

(b) HEARING POWERS — Officers presiding at hearings shall have authority, subject to the published rules of the agency and within its powers, to (1) administer oaths and affirmations, (2) issue subpoenas authorized by law, (3) rule upon offers of proof and receive relevant evidence, (4) take or cause depositions to be taken whenever the ends of justice would be served thereby, (5) regulate the course of the hearing, (6) hold conferences for the settlement or simplification of the issues by consent of the parties, (7) dispose of procedural requests or similar matters, (8) make decisions or recommend decisions in conformity with section 8, and (9) take any other action authorized by agency rule consistent with this Act.

(c) EVIDENCE — Except as statutes otherwise provide, the proponent of a rule or order shall have the burden of proof. Any oral or documentary evidence may be received, but every agency shall as a matter of policy provide for the exclusion of irrelevant, immaterial, or unduly repetitious evidence and no sanction shall be imposed or rule or order be issued except upon consideration of the whole record or such portions thereof as may be cited by any party and as supported by and in accordance with the reliable probative, and substantial evidence. Every party shall have the right to present his case or defense by oral

or documentary evidence, to submit rebuttal evidence, and to conduct such cross-examination as may be required for a full and true disclosure of the facts. In rule making or determining claims for money or benefits or applications for initial licenses any agency may, where the interest of any party will not be prejudiced thereby, adopt procedures for the submission of all or part of the evidence in written form.

(d) RECORD. — The transcript of testimony and exhibits, together with all papers and requests filed in the proceeding, shall constitute the exclusive record for decision in accordance with section 8 and, upon payment of lawfully prescribed costs, shall be made available to the parties. Where any agency decision rests on official notice of a material fact not appearing in the evidence in the record, any party shall on timely request be afforded an opportunity to show the contrary.

SEC. 8. In cases in which a hearing is required to be conducted in conformity with section 7 —

(a) ACTION BY SUBORDINATES. — In cases in which the agency has not presided at the reception of the evidence, the officer who presided (or, in cases not subject to subsection (c) of section 5, any other officer or officers qualified to preside at hearings pursuant to section 7) shall initially decide the case or the agency shall require (in specific cases or by general rule) the entire record to be certified to it for initial decision. Whenever such officers make the initial decision and in the absence of either an appeal to the agency or review upon motion of the agency within time provided by rule, such decision shall without further proceedings then become the decision of the agency. On appeal from or review of the initial decisions of such officers the agency shall, except as it may limit the issues

upon notice or by rule, have all the powers which it would have in making the initial decision. Whenever the agency makes the initial decision without having presided at the reception of the evidence, such officers shall first recommend a decision except that in rule making or determining applications for initial licenses (1) in lieu thereof the agency may issue a tentative decision or any of its responsible officers may recommend a decision or (2) any such procedure may be omitted in any case in which the agency finds upon the record that due and timely execution of its functions imperatively and unavoidably so requires.

(b) SUBMITTALS AND DECISIONS. — Prior to each recommended, initial, or tentative decision, or decision upon agency review of the decision of subordinate officers the parties shall be afforded a reasonable opportunity to submit for the consideration of the officers participating in such decisions (1) proposed findings and conclusions, or (2) exceptions to the decisions or recommended decisions of subordinate officers or to tentative agency decisions, and (3) supporting reasons for such exceptions or proposed findings or conclusions. The record shall show the ruling upon each such finding, conclusion, or exception presented. All decisions (including initial, recommended, or tentative decisions) shall become a part of the record and include a statement of (1) findings and conclusions, as well as the reasons or basis therefor, upon all the material issues of fact, law, or discretion presented on the record; and (2) the appropriate rule, order, sanction, relief, or denial thereof.